

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

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Joseph W. Stewart

CLERK

SUPPLEMENT TO BRIEF FOR APPELLANT

**In the United States Court of Appeals
for the District of Columbia**

No. 7876

UNITED STATES OF AMERICA, APPELLANT

v.

HARRY C. COX, APPELLEE

**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA**

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INDEX

	Page
Evidence on behalf of the plaintiff:	
Medical records.....	1
Stipulation of undisputed facts.....	21
Witnesses:	
Harry C. Cox:	
Direct examination.....	22
Cross-examination.....	41
Redirect examination.....	75
Re-cross-examination.....	81
Redirect examination.....	83
John M. Harris:	
Direct examination.....	83
Cross-examination.....	86
Redirect examination.....	87
Re-cross-examination.....	87
Sidney H. Smith:	
Direct examination.....	87
Cross-examination.....	90
Redirect examination.....	91
Robert Clem:	
Direct examination.....	91
Cross-examination.....	93
Redirect examination.....	98
Charles K. Mason:	
Direct examination.....	98
Cross-examination.....	100
Dr. Ray F. Gynn:	
Direct examination.....	101
Cross-examination.....	121
Redirect examination.....	132
John Henry Pfeiger:	
Direct examination.....	133
Cross-examination.....	137
Dr. James Joseph Whisman:	
Direct examination.....	138
Cross-examination.....	141
Evidence on behalf of the United States:	
Witnesses:	
Mrs. Dorothy Stewart:	
Direct examination.....	148
Cross-examination.....	149
Venner E. Spiers.....	149

II

Evidence on behalf of the United States—Continued:

	Page
Government's Exhibits:	
No. 1.....	154
No. 2.....	155
No. 3.....	156
No. 4.....	157
Witnesses:	
Ernest Lunsford:	
Direct examination.....	158
Cross-examination.....	159
Redirect examination.....	160
Hugh A. Grigsby:	
Direct examination.....	160
Cross-examination.....	162
William W. McClaine:	
Direct examination.....	164
Cross-examination.....	171
Redirect examination.....	173
Re-cross-examination.....	174
Dr. Raymond K. Foxwell:	
Direct examination.....	174
Cross-examination.....	177
Redirect examination.....	181
Medical Records.....	184
Motion for directed verdict.....	199
Discussion of Prayers.....	199
Argument to the jury.....	200
Instructions to the jury.....	202
Judgment.....	205

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EVIDENCE ON BEHALF OF THE PLAINTIFF

Mr. DAWSON. Your Honor, and ladies and gentlemen of the jury, in cases of this type the Commissioner of the Veterans' cases has compiled the records of the War Department, of the Veterans' Bureau; and it is stipulated that these are the true and correct copies of such records; and it is further stipulated that we may read in the course of the trial such excerpts from those records as counsel may desire: counsel may read into the record.

Now, at this time I am going to read the record, starting first with what the War Department shows as to the physical examination of Mr. Cox at the time of his enlistment in 1917.

The first one is his certification at the time of his enlistment [reading]:

I certify I carefully examined the person named on the first page thereof—which refers to Mr. Cox—and have carefully recorded the results of the examination, and in my judgment he is physically qualified for military service.

That is signed by J. C. Edgar, First Lieutenant, Medical Reserve Corps, Camp Lee, Virginia, September 23, 1917.

Now I am going to read from the medical reports, or from the reports of the medical records at Camp Lee, Virginia, while he was in the military service. I shall just read those which are pertinent [reading]:

Medical card shows that Harry C. Cox was admitted to the Regimental Infirmary at 317th Infantry, Camp Lee, Virginia, December 6, 1917. Cause of admission: rhinitis, caused in line of duty. Disposition: duty (R. 11) December 10, 1917.

The COURT. What was the disability?

Mr. DAWSON. That was rhinitis, your Honor. That is not a disability that I am depending on here, but I wanted to give them the whole complete medical history.

The COURT. If you are going to have testimony as to what that word means, because I don't know what it means. The jury may all know.

Mr. SPELL. It is a head cold, your Honor.

Mr. DAWSON. We will have a doctor, your Honor.

The COURT. How do you spell it?

Mr. DAWSON. R-h-i-n-i-t-i-s. It is a condition of the nose, your Honor (R. 12).

* * * * *

Mr. DAWSON [reading]:

Medical card, Infirmary 317th Infantry, Camp Lee, Virginia, shows Harry C. Cox admitted March 6, 1918. Cause of admission: acute articular rheumatism, both knees. In line of duty. Disposition: duty May 4, 1918. In hospital, 26 days in March, 30 in April, and 8 in May 1918, total 56 days.

Clinical record—

Mr. SPELL (interposing). Just one minute. Counsel made a mistake. It is 3 days in May, I believe.

Mr. DAWSON. I said 30 days in April, 3 days in May.

Mr. SPELL. No.

Mr. DAWSON. '18. Total: Is that 59 days?

Mr. SPELL. I thought you said 30 in May. I beg your pardon.

Mr. DAWSON. No. I must be unable to read, because that is the way I read it—I thought.

(Reading:)

“Clinical record, Base Hospital, Camp Lee, Virginia (R. 14), shows Harry C. Cox admitted March 6, 1918. Disposition: duty C. of D., date June 18, 1918. Final diagnosis: Mitral regurgitation; not in line of duty, existed prior to enlistment. Condition on completion of case: unimproved.”

“Medical card attached to this record shows cause of admission—acute articular rheumatism, both knees, complication, etc. (A) Valvular heart disease, mitral regurgitation; existed prior to enlistment. Not in line of duty. (B) Decrease in cardiac compensation, subsequent to rheumatic fever acute and bronchitis acute, in line of duty April 30, 1918.

“This record shows under family and personal history: occupation, baker.

“Under Progress: 3-6-18—Since November has been hoarse and weak. Had sore throat then and hoarse since, also coughs a good deal. Lost some flesh. This trouble started yesterday with some fever, dryness in throat, and pain in joints. Examination shows patient to be fairly developed.” N. E.—I can’t—“good color, speaks little above whisper. Throat, soft palate very much injected, tonsils not large, teeth decayed. Temperature. Breathing rough in midright axilla and along right paravertebral line. Heart: Maximum impulse in chest 8 centimeters for M. S. L. Faint systolic murmur heard at apex and in midaxilla. No enlargement made out. Abdomen negative. Left knee tender and motion restricted.”

Then on April 23, 1918:

“Patient returned today from (R. 15) Convalescent Barracks. Complains of shortness of breath on exertion. Major Santee has requested heart and chest

examination. Signed: J. O'Neill. Suffered with shortness of breath for 3 years. Diagnosis: Valvular heart disease mitral regurgitation. Not in line of duty, existed prior to enlistment. Decrease in cardiac compensation subsequent to rheumatism, fever acute and bronchitis acute." Signed Dr., or Captain F. J. Smith.

"Service record of Harry C. Cox shows, on page 2—Indelible or permanent marks"—strike that out; that's about insurance. It isn't necessary.

"Certificate of disability for discharge of Harry C. Cox shows him recommended for discharge on account of (a) Valvular heart disease (mitral regurgitation); (b) Decrease in cardiac compensation, subsequent to rheumatic fever, became unfit for duty from present disease. (a) Prior to enlistment; (b) March 5, 1918, disease contracted; (a) Prior to enlistment; (b) March 5, 1918 at Camp Lee, Va. When disability (a) arose soldier was not in service of the United States. When disability (b) arose soldier was on duty as private March 5, 1918, at Camp Lee, Va. (a) Cause unknown, not in line of duty; (b) Cause unknown, subsequent to rheumatic fever, acute, in line of duty. Signed: Lewis Knicker, Captain of Infantry, National Army, Camp Lee, Virginia, May 28, 1918 (R. 16).

"Report of Board of Medical Officers: From a careful consideration of all the evidence obtainable in the case and a critical examination of the soldier, we find that he is unfit for service as a soldier because of (a) valvular heart disease (mitral regurgitation); (b) decrease in cardiac compensation, subsequent to rheumatic fever, acute. Since age of 18 has had frequent attacks of muscular pains. Admitted to Base Hospital March 6, 1918, complaining of pains and stiffness in both knee joints. After admission both elbows and hip joints became involved. Past three years has had dyspnoea at times, lungs, abdomen, and Wasserman, negative. Urinalysis: Reaction acid—albumen negative. Microscopically—no casts, an occasional red cell found, and pus and calcium exalate. Heart: Pulse

dorsal, 116; blood pressure, S-105; D-85. Cardiac dullness $8\frac{1}{2}$ cm. to left in 5 space and 4 cm. to right in 4th. Blowing systolic murmur at apex transmitted to left axilla, to left back. Pulmonic 2nd sound not accentuated. History of 3 previous attacks of rheumatic fever.

"That the disqualifying disability (a) did, (b) did not exist prior to enlistment, and (a) did not originate in line of duty, and (b) did originate in line of duty. That the medical officer who enlisted the soldier is not blamable.

"We therefore recommend that the soldier be discharged for disability which (b) was, and (a) was not incurred in line of duty. Length of time case has (R. 17) been under observation of one or more members of the Board— $2\frac{1}{2}$ months. In view of occupation, to what extent is he disabled from earning subsistence? (a) $\frac{1}{8}$ (one-eighth); (b) $\frac{1}{8}$ (one-eighth). The soldier did, did not decline treatment for the relief of disability."

Following sick reports of Harry C. Cox while in the Army:

"December 7, 1917, from duty to sick in quarters.

"December 11, 1917, from sick in quarters to duty.

"March 7, 1918, from duty to Base Hospital.

"June 18, 1918, from absent sick in hospital to Discharge per paragraph 11 and special order 163 Headquarters Camp Lee, Virginia, 6-15-18.

"Entries on Daily Sick Reports show the following pertaining to sickness of Harry C. Cox:

"December 6, 1917, Harry C. Cox, sick in line of duty; Disposition, duty to quarters.

"December 7, 1917, Harry C. Cox, sick in line of duty; Disposition, quarters.

"December 8, same.

"December 9, same.

"December 10, Harry C. Cox, sick in line of duty, Disposition, quarters to light duty.

"January 30, 1918, Harry C. Cox, sick in line of duty; Disposition, duty.

"March 6, 1918, Harry C. Cox, sick in line of duty; Disposition, duty at Base Hospital.

"March 7, 1918, sick in line of duty; Disposition (R. 18), Base Hospital.

"March 8, 1918, same.

"March 9, 1918, same.

"March 10, 1918, same.

"March 11, 1918, same.

"March 12, 1918, same.

"March 13, 1918, same.

"March 14, 1918, same.

"March 15, 1918, same.

"March 16, 1918, same.

"March 17 to 29, 1918, same.

"March 30, 1918, Harry C. Cox, sick in line of duty [marked out].

"March 30 to April 13, 1918, inclusive, Harry C. Cox, sick in line of duty; Disposition: Base Hospital.

"April 14 to 25, 1918, inclusive, same.

"April 26 to May 3, 1918, inclusive, same.

"May 4, 1918, Harry C. Cox, sick in line of duty; Disposition: Base Hospital to transfer."

This is a report of physical examination made by a Public Health Service surgeon, after he was discharged from the service, on August 23, 1918. He was examined by one Dr. W. R. Jones, a surgeon of the Public Health Service, and the following diagnosis was made: "Chronic endocarditis with mitral regurgitation. Chronic laryngitis."

"The claimant states that he has had a thorough treatment of infected gums, having some teeth extracted and others disinfected. In view of (R. 19) this fact, his disease will probably be arrested, and a period of six months will probably be necessary before he is able to resume any occupation.

"Treatment: Initial period of four to six weeks' hospital treatment advised, at which time the patient

should be kept at rest, followed by graduated exercises, suitable diet, and tonic medication."

This is a report of physical examination also made by a surgeon, or by a physician of the Public Health Service, on April 9, 1919:

Blood pressure at that time was 135 over 90; urine was negative. "Heart reveals a murmur pathognomonic of mitral regurgitation. Lungs reveal some rales in the apices of both lungs.

"Diagnosis: Mitral regurgitation, with broken compensation. Possibly chronic pulmonary tuberculosis, but signs are indicative of cardiac asthma. Absence speaking of voice.

"Prognosis: Uncertain."

Mr. SPELL. Your Honor, we object to the reading of the prognosis. You will notice this prognosis has to deal with the issue that the jury has been impaneled to decide, and I don't think that that is proper. I believe counsel agree with me on that.

Mr. DAWSON. Well, I think the Court did hold in the Balance case, if your Honor please, the Court of Appeals, that the prognosis—but since that time there has been a statute which says that anything made of record at a particular time is (R. 20) prima facie evidence of the fact. Now, whether that takes it out of the rule in the Balance case is another question. But, your Honor, in order to make certain that the Government doesn't get any error in this record, I am going to refrain from reading the prognosis.

The COURT. The Court will strike out anything about the prognosis.

Mr. DAWSON. This is a report of physical examination made by H. E. Trimble, Assistant Surgeon of the United States Public Health Service, on May 6, 1919, particularly calling your attention, ladies and gentlemen of the jury, to a stereoscopic X-ray examination made of the plaintiff's chest: in other words, the reading of it:

"There is mottling in the left apex and peribronchial thickening in both upper lobes which is suspicious

but not diagnostic of tuberculosis, as a recent pneumonia would give a similar appearance. If there is any history of recent illness the pathology is probably a subacute tuberculosis.' ”

Further reading from a report on April 16, 1919, made at the same time or at or about the same time in connection with this other report:

“The throat examination was made by Dr. J. A. Flynn, a copy of whose report is enclosed herewith. Dr. Flynn was of the opinion that the aphonia was in a large degree hysterical and suggested that as the man's tonsils were in poor condition that they be (R. 21) removed in the hope that the operation might remove the partial aphonia. Tonsils were removed on April 17th. Mr. Cox states that he lives on a farm at East Falls Church, Virginia, near Washington, under very good hygienic conditions, and he wishes to be treated in his home. He will report to this office and to Dr. Flynn for subsequent examination and treatment as may be necessary.”

Diagnosis on the basis of these two examinations: “Chronic pulmonary tuberculosis. Disability”—

Mr. SPELL. Just you wait a minute. Your Honor, we object to the rest of that. That is plainly a prognosis: it states the doctor's opinion. It is the same objection we made before.

The COURT. I didn't catch just what it was. Will the reporter read the last part of that?

The Reporter (reading): “Diagnosis on the basis of these two examinations: ‘Chronic pulmonary tuberculosis. Disability’ ”—

Mr. SPELL. Well, we don't object to the “chronic pulmonary tuberculosis,” but the rest of that is purely prognosis, and we do object to that, and your Honor sustained that objection.

The COURT. Just wait a minute.

Mr. MILLER. Tell him the page number.

The COURT. I shall sustain the objection for the present. I don't know what it is (R. 22).

Mr. DAWSON. Your Honor, if I may, if you have the report there, it is on page 6 of the report.

The COURT. I haven't got it.

Mr. DAWSON. Is the original here on file?

Mr. MILLER. It's in the pleadings.

Mr. SPELL. It's in the Clerk's files.

Mr. DAWSON. Yes. Maybe your Honor would like to follow it.

The COURT. I doubt if the statement of the counsel for the Government is correct. I will sustain the objection, but I might not construe evidence as he has construed evidence if I could see it.

Mr. DAWSON. Your Honor, I don't think his objection is valid as to this.

(A paper was handed to the Court, and there was a brief pause.)

Mr. DAWSON. Shall I proceed, your Honor?

The COURT. Yes, sir. The Court is not in a position, apparently, to rule upon that question until I get it.

Mr. COSTELLO. Your Honor, may we approach the bench on that question?

The COURT. Sir?

Mr. COSTELLO. May we approach the bench on that question?

The COURT. Yes, sir.

(Counsel for both sides approached the bench and conferred with the Court, in a low tone of voice, as follows:)

Mr. COSTELLO. This is a question the jury has to decide. The United States Supreme Court, in the *Spaulding* (R. 23) case have ruled that a doctor may not express an opinion on what the Court is to pass on.

The COURT. Yes; but I don't know what he said in it.

Mr. SPELL. Your Honor, this is the portion that I object to, beginning with "disability," you see, beginning right here [indicating], the rest of that sentence, your Honor. That is purely a prognosis, in my opinion. It is the same question that you sustained my objection to before.

The COURT. Well, do you mean to say, or do you go so far as to say, that in these cases, in a matter where a layman

couldn't be expected to reach a conclusion, an expert may not testify as to whether the disability is total or permanent?

Mr. SPELL. The Supreme Court has held, your Honor, that a medical expert may not testify: that is the question for the jury to decide.

The COURT. Well, that is a question for the jury to decide in every case, not only in insurance cases but in every case; but this is the only instance that I have ever heard in my life where, in a matter that required expert knowledge, an expert could not be allowed to testify. I never heard of such a thing before. I have read that decision that you refer to.

Mr. SPELL. That is the *Spaulding* case, your Honor, and it was passed on by the Supreme Court.

Mr. DAWSON. Your Honor, if I may be permitted to say, the *Spaulding* case goes no further than to say that an expert may not be asked the question, right-out question, whether a man is permanently or totally disabled. Yet cases hold that the expert may go as close to the ultimate question as possible without touching upon the ultimate question. So they have a (R. 24) right to come in here and say whether this disability is——

The COURT. I don't know what sort of lapse the Supreme Court had when they did that, but I will look it up and see. I cannot conceive of a thing like that.

Mr. DAWSON. Now, this question here, your Honor, that he objected to: it says disability may be considered as temporary total, and he shall not be allowed to do any phys- ——

The COURT. I don't——

Mr. DAWSON. Now, that doesn't relate to a prognosis. That relates to a present condition.

The COURT. I don't really know what your purpose in reading this is, anyhow, or I don't know on what authority you can introduce what seems to be hearsay testimony, unless it is upon the District of Columbia rule that records are admissible.

Mr. DAWSON. There is a special rule on this, your Honor, in veterans' cases.

Mr. SPELL. Yes, sir.

Mr. DAWSON. This has been done in order to save the time of the Court: they consolidate all these records, and they stipulate either party may read.

The COURT. I will overrule your objection on that, sir.

Mr. SPELL. You will note an exception?

The COURT. Yes.

(At the conclusion of the forgoing conference, counsel returned to the trial table, and the trial proceeded as follows:)

Mr. DAWSON. Referring back to page 6, as to which your Honor overruled the objection, the examination of April 4 (R. 25) 1919, and April 16, 1919, the diagnosis was chronic pulmonary tuberculosis. Disability may be considered as temporary total, as he should not be allowed to do any active work at present.

Mr. SPELL. I believe the record will show that I made an objection to that.

The COURT. Yes.

Mr. DAWSON. Now, examination made November 29, 1919. This is also made by a Public Health physician, Dr. W. J. Heffner, Acting Assistant Surgeon.

The COURT. Mr. Dawson.

Mr. DAWSON. Yes?

The COURT. Will you suspend? There is a jury ready to come in.

Mr. DAWSON. Yes. Very well, your Honor.

(There was a brief interruption of proceedings.)

The COURT. Proceed, sir.

Mr. DAWSON. Thank you.

As I said before, this is a report of physical examination made on November 29, 1919, by Dr. W. J. Heffner, Acting Assistant Surgeon of the Public Health Service, in which the following diagnosis was made:

"Tubercular laryngitis.

"Treatment recommended in this case is full anti-tubercular treatment, preferably sanitorial."

Report of physical examination of January 28, 1920, Federal Board for Vocational Education, Division of Rehabilita-

tion, bears the name of Albert Eisenberg, Assistant Surgeon of the Public Health Service (R. 26).

Diagnosis in the case:

"Laryngitis, chronic.

"Arthritis, chronic, ankles and elbows, bilateral, and left knee."

"Claimant is not able to resume former occupation; not advised."

Mr. SPELL. Your Honor, I object to that, reading of that diagnosis and opinion as to whether the man could follow a vocational occupation. The doctor hasn't qualified as a vocational expert, and it purely invades the province of the jury, and I respectfully object (R. 27).

* * * * *

The COURT. All right. Now, just a minute. The objection is to that prognosis, isn't it? To the words between "prognosis" and "remarks"? (R. 28.)

Mr. COSTELLO. That is right.

Mr. SPELL. Yes, your Honor; that is the objection before the Court.

The COURT. Objection sustained.

Mr. DAWSON. May I call your Honor's attention to the fact that that is not part of the prognosis. I didn't read the prognosis. This is something that the examiner has to find in his report; he makes that up.

The COURT. It comes under the prognosis, doesn't it?

Mr. MILLER. No.

Mr. DAWSON. No; it doesn't come under the prognosis. If I can get this report I should like to show it to you. I ask counsel now for this report of physical examination January 28, 1920. If you have it I should like to show it to your Honor. This does not come under the prognosis.

Mr. SPELL. Yes, your Honor. I have that. That doesn't come under the prognosis.

The COURT. Sir?

Mr. SPELL. This statement beginning "claimant is not able to resume" does not come under the prognosis. I will admit that, if that is what you want.

Mr. DAWSON. Yes; that is what I contend.

Mr. SPELL. I also object to the reading of the prognosis, your Honor.

The COURT. Which? What was it you objected to? The reading of the prognosis?

Mr. SPELL. Yes. He didn't read the prognosis; I didn't hear him read it, but he did read this statement here beginning with "Claimant is able to resume" (R. 29).

Mr. DAWSON. No. "Is not able."

Mr. SPELL. "Is not able." He did read that entire statement, or wished to read it, and I objected to its reading.

The COURT. Well, that is practically the prognosis.

Mr. SPELL. Well, it is about the same thing, your Honor.

Mr. DAWSON. Well, your Honor, the prognosis—

The COURT. It is not about the same thing; it is the same.

Mr. DAWSON. Well, your Honor, a prognosis, as I understand, deals with his future, as to his probability to reaction. Here is a finding as to the man's present condition. It is his present condition that he is talking about, not about the future, not about the prognosis of what he may be six months from now, because your prognosis is—I didn't want to read it, but your prognosis is what happens in the future. This is something that this man found right at this particular time. If he were here to testify he could testify to it.

The COURT. No, he couldn't.

Mr. DAWSON. You think not?

The COURT. He could testify to the condition which he found.

Mr. SPELL. Yes, your Honor.

The COURT. But whether or not that would justify the conclusion would be a matter for the jury.

Mr. SPELL. Yes, your Honor.

Mr. DAWSON. Very well.

Report of physical examination on February 8, 1922, by Dr. E. V. Chadwick:

"Summary: Temperature, 99. Pulse rate, 108. (R. 30.) X-ray of lungs, taken February 8th, 1922, reported as follows:

" 'Moderately advanced tuberculosis of both lungs.' "

That is signed "P. P. Crimmins, M. D."

The COURT. This Court is not disposed to interfere with any established practice, of course, but in the reading of that report it is very evident that some parts of it are unintelligible to the lay mind. Now, is it the practice to read those reports to the jury, part of which they evidently cannot understand, and let them stand as evidence without any explanation of the nature of the complaint or the disease or the meaning of initials?

Mr. DAWSON. No, your Honor, because we are going to call physicians to explain all these diagnoses.

The COURT. Well, that is all right. I thought that ought to be understood before we went any further with this matter.

Mr. SPELL. Yes.

The COURT. Proceed, gentlemen.

Mr. DAWSON. This is a report of examination dated June 21, 1922, at Walter Reed Hospital, General Hospital:

"Diagnosis: Laryngitis, chronic, hypertrophic, cause undetermined."

"X-ray of lungs, taken August 14, 1922, reported as follows:

"'Moderate infiltration of the right upper lobe and both apices. Scattered thickened branches throughout both lungs.'"

"No evidence of pulmonary disease found at this (R. 31) examination."

Examination with X-ray report made February 10, 1923, of the chest, heart, and lungs:

"Findings: Considerable thickening of the bronchial structures throughout both bases. Lungs otherwise clear."

Mr. COSTELLO. Mr. Dawson, what page is that on?

Mr. DAWSON. That is on page 14.

"Special Tuberculosis Report, February 9, 1923:

"Temperature 98.4 degrees. Pulse 114. Time of examination: 1:30."

"Diagnosis: Tuberculosis of larynx.

"Bronchitis, chronic.

"Asthenia, neurocirculatory slight.

"Hysteria."

Report of examination made February 9, 1923, by Henry Lee Smith, Cardiovascular Specialist, with a diagnosis of: "Asthenia, neurocirculatory, slight."

Report of mental and nervous specialist made at the same time, with a diagnosis of hysteria.

Special pulmonary report on April 4, 1924.

Mr. SPELL. What page, please, Mr. Dawson?

Mr. DAWSON. This copy is not very clear. 18.

Mr. MILLER. It looks like 19 to me.

Mr. DAWSON. 19.

Mr. SPELL. Thank you (R. 32).

Mr. DAWSON. "Temperature 37. Pulse 100."

"Examination of chest: Shape: appearance good. No anemia. Nutrition good. Flat chest. Mobility: no restriction. No lagging. Palpation—Fremitus: normal. Percussion—both lungs: impaired at the apex and suprascapular region. Auscultation—both lungs: broncho-vesicular breathing. Mild increase of voice sounds. No rales."

No evidence of active tuberculosis at the time of this examination.

"General diagnosis:

"Hyperopia.

"Astigmatism.

"Tachycardia.

"Chronic tonsillitis.

"Chronic laryngitis."

Report of mental examination on April 5, 1924. Diagnosis: Patient has some few subjective psychoneurotic symptoms, which are not of sufficient importance to justify diagnosis.

Report of physical examination, mental and nervous specialist, October 28, 1924:

"Because of the claimant's disability and marked emotional reaction it is noted that on former occasions

such attempts have made the patient sick for the entire day; in fact for about a week."

"Examination: Normal appearance. Not psychotic. Not mentally deteriorated or deficient. No tendency (R. 33) towards emotional instability, except when discussing his throat trouble

"Diagnosis: Hysteria, conversion type."

Report of physical examination made on May 16, 1925, with a diagnosis of "Hysteria, mild."

Report dated July 9, 1925, consulting mental-nervous specialist, with the recommendation that his condition be seen by the throat and chest specialist.

Report of examination made at the Veterans Hospital No. 32, Washington, D. C., July 15, 1925:

"Adductor paralysis larynx, myopathic type, functional."

Recommended treatment for laryngitis.

Report of physical examination dated January 15, 1926, at the United States Veterans' Bureau, Washington, D. C.:

"His marked emotional reaction to treatment was noted in my previous report.

"Diagnosis:"

Mr. SPELL. Mr. Dawson, may I interrupt? What page is that?

Mr. DAWSON. 25.

Mr. SPELL. 25. Thanks.

Mr. DAWSON. It is "Hysteria."

Report of examination March 10, 1928.

"Examination of lungs:

"Pulmonary diagnosis: Tuberculosis pulmonary (R. 34), chronic, minimal, arrested. Diagnosis made on reports in file, positive sputum and physical findings, X-ray report."

Report of physical examination by nervous and mental specialist on March 10, 1928, with a diagnosis of "Psycho-neurosis hysteria, moderate."

X-ray report or fluoroscopic findings, on March 12, 1928:

"Radiostereoscopic examination of the chest shows some increase at the hilus and throughout both lungs."

Signed "J. F. Elward, M. D., Roengenologist."

Report of physical examination made of the plaintiff on March 14, 1929, mental-nervous specialist.

"Diagnosis: Psychoneurosis, moderate degree."

Also chest examination by Dr. G. J. Allen, T. B. or Tuberculosis Specialist:

"Percussion—both lungs: no impairment noted. Auscultation—both lungs: no rales. Mild broncho-vesicular breathing over apex.

"Pulmonary diagnosis: Chronic pulmonary tuberculosis, minimal, apparently cured."

With a general diagnosis of "Laryngitis, chronic. Aphonia, partial. Pulmonary tuberculosis, minimal, apparently cured. Psychoneurosis, moderate degree."

Neurological examination made on October 15, 1929, U. S. Veterans' Dispensary, Washington, D. C. (R. 35):

"Claimant is exceedingly well nourished on inspection and on palpation tone is fairly good but despite this he has an actual muscular weakness on exertion, possibly due to accelerated pulse. He has a slight tremor of outstretched fingers. Eye pupils are reactive to light and accommodation. Station and gait O. K. Pulse is 96 standing. 120 after exercise, and 96 in two minutes.

"Diagnosis: Neurasthenia moderate degree, neuro-circulatory in type."

X-ray examination of chest made October 17, 1929:

"Radiostereoscopic examination of the chest shows thorax, heart, and diaphragm normal. Considerable increase at each hilus with some calcification. Right vertebral branch markedly increased with some fibrotic changes noted in right upper lobe and apex. Lung parenchyma shows some slight increase throughout.

"Pulmonary diagnosis: Tuberculosis pulmonary, chronic, minimal, inactive, apparently cured."

"General diagnosis:

"Neurasthenia, moderate degree, neurocirculatory in type.

"Laryngitis, chronic, moderate.

"Tuberculosis, pulmonary, chronic, minimal, inactive, apparently cured."

Report of Fluoroscopic findings, United States Veterans' Hospital, on October 17, 1929 (R. 36).

"Radiostereoscopic examination of the chest shows thorax, heart, and diaphragm normal. Considerable increase at each hilus with some calcification. Right vertebral branch markedly increased with some fibrotic changes noted in rt. upper lobe and apex. Lung parenchyma shows some slight increase throughout."

Report of examination by a mental and nervous specialist at the dispensary of the United States Veterans' Bureau, on December 2, 1930:

"Station and gait O. K. No particular tremors, but he shows tendency in this direction. Pulse 96 standing, 124 after 15 hops on one foot, 110 in 3 minutes. Blood pressure, 150/80. He may be an early case of hypertension but I am inclined to believe part of his pressure at this time is due to emotional tension."

"Diagnosis: Neurocirculatory asthenia, moderate degree."

Report of examination made on August 25, 1932:

Psychiatric: A cooperative, neat, tidy individual. He shows no depression or hyperactivity. He is fully oriented and shows no evidence of a psychosis. His make-up is that of a neurotic individual. His many subjective complaints are sincere and well fixed.

"Neurological: A well developed and nourished patient. No great amount of neurological tension but a definite lack of confidence in himself is very evident. No evidence of organic neurology. Pulse rate is in-

creased (R. 37) but regular. At rest 90; blood pressure 140/90. After exercise——"

referring to pulse rate——

"130; blood pressure 130/70. After three minutes 90; blood pressure 135/90. A slight cyanosis evident after exercise. There is a poor muscle tone on palpation. A fine tremor of closed eye lids and a moderate hyperhidrosis."

"Diagnosis: Psychoneurosis."

The COURT. The Court stands recessed at this time.

(Thereupon there was a brief informal recess, at the conclusion of which the proceedings were resumed as follows:)

Mr. DAWSON (reading). Report of physical examination, Veterans' Administration Facility, Washington, D. C., April 22, 1936:

"Temperature, 99.0. Respiratory rate: Standing 20; sitting 20; immediately after exercise, 26; 3 minutes after exercise, 20. Pulse rate: Standing 86; sitting 86; immediately after exercise 120; 3 minutes after exercise 90."

"Diagnoses:

"1. Psychoneurosis, mixed type, moderate.

"2. Laryngitis, chronic, mild.

"3. Hypertension, moderate.

"4. History of pulmonary tuberculosis" (R. 38).

Examination made on June 8, 1936, by a mental and nervous specialist:

"He is not sad or depressed. He does not have any crying spells. He shows no overproduction or underproduction."

"Diagnosis: Psychoneurosis, mixed type, moderate."

Report of physical examination made at the Out-Patient Division of the Veterans' Administration Facility at Washington, D. C., on October 29, 1936:

"Diagnoses:

"1. Psychoneurosis, neurasthenia, moderate.

"2. Hypertension, moderate.

"3. Laryngitis, chronic, hypertrophic, moderate.

"4. Tonsillar tags, bilateral."

Report of examination made October 29, 1936, at the Veterans' Administration Facility, Washington, D. C.:

"The patient states that he is not nervous. He is very quiet, cooperative, and agreeable. He attributes all of his trouble to his heart and lung condition. The patient is oriented for time, place, and person. He is emotionally level. There is no evidence of hallucinations or delusions. The patient is only fairly neat in his appearance personally. Insight and judgment into his condition are not the best. There are no memory defects. His orientation is correct."

"We are dealing with a psychoneurotic condition of (R. 39) considerably long standing."

The COURT. What is the date of that?

Mr. DAWSON. That is in 1936, your Honor. That is October 29, 1936.

"Diagnosis:

"1. Psychoneurosis, neurasthenia, moderate.

"2. Hypertension, moderate."

That is all of the record, your Honor.

Now, if your Honor please, for the purpose of the record I assume that counsel will stipulate that the insurance contract of plaintiff in this case, Harry C. Cox, continued in full force and effect in the amount of \$10,000 until July 1, 1927, so that we won't have to prove that.

The COURT. Your answer makes that statement, doesn't it?

Mr. MILLER. The pleading makes it.

Mr. SPELL. I think so, your Honor.

The COURT. That is my recollection of it.

Mr. DAWSON. It does not deny it, your Honor.

The COURT. It makes a specific admission.

Mr. DAWSON. Well, we allege it, but they don't deny it, and I thought it would probably clear the record up here.

The COURT. I think it is. It should have been. I may be mistaken.

Mr. SPELL. Your Honor, I can specifically state the facts. There were several reinstatements.

Mr. DAWSON. Well, stipulate them right into the record, then, if you will stipulate them (R. 40).

Mr. SPELL. All right.

STIPULATION

Mr. SPELL. It is agreed between counsel for plaintiff and defendant Harry C. Cox was granted a \$10,000 contract of yearly renewable term insurance while in the military service of the United States, on February 1, 1918; that this insurance first lapsed for nonpayment of a premium due March 1, 1926; that the full amount of this insurance was reinstated effective April 1, 1926 and again lapsed for nonpayment of the premium due July 1, 1926; that the entire amount of this insurance was again reinstated effective September 1, 1926; and the last premium paid thereon included the month of May 1927; that by reason of the grace period of thirty-one days said insurance remained in effect until July 1, 1927, and ceased thereafter.

Mr. DAWSON. Unless he became permanently and totally disabled prior thereto.

Mr. SPELL. Yes.

Mr. DAWSON. Now, Mr. Spell, do you admit that a claim was filed with the United States Veterans' Bureau for the payment of benefits under this insurance?

The COURT. Did this case go to the pretrial Judge?

Mr. MILLER. No.

Mr. DAWSON. No, your Honor. I understand these cases do not go to the pretrial Judge.

The COURT. All right. Proceed.

Mr. SPELL. We admit the Court's jurisdiction; that there was a claim; that it was denied, and that suit was filed timely thereafter (R. 41).

The COURT. There is no question of limitations in the case?

Mr. SPELL. None. We raise none.

Mr. DAWSON. And there is no question about the fact that a claim was made to the Veterans' Bureau?

Mr. SPELL. None whatsoever.

Mr. DAWSON. And that that claim was denied by the proper and lawful officials of the Veterans' Administration prior to the institution of this action?

Mr. SPELL. No question about that. We admit that.

Mr. DAWSON. Very well.

The COURT. All right.

Mr. DAWSON. Now, I shall call Mr. Cox to the stand.

Thereupon

HARRY C. Cox, the plaintiff, was called as a witness in his own behalf and, having been first duly sworn, was examined and testified as follows:

Direct examination by Mr. DAWSON:

Q. Now, Mr. Cox, will you speak as loudly as you can, so that the jury can hear you? Will you state your full name?—

A. Harry C. Cox.

Q. And are you the plaintiff in this case?—A. Yes, sir.

Q. And where do you live, Mr. Cox?—A. I live in Arlington, 911 North Greenborough.

Q. Can you speak just a little more loudly, please?—A. 911 North Greenborough, Arlington (R. 42).

Q. And were you in the military service of the United States during the period of the World War?—A. Yes, sir.

Q. And about what time did you enter the service?—A. On the 18th of September 1917.

Q. And where were you located?—A. Camp Lee.

Q. And after you got to Camp Lee, after you were inducted or enlisted in the service, did anything happen to you there, as a matter of sickness?—A. Yes, sir.

Q. Will you just tell the jury in your own words for what you were treated while you were in Camp Lee?—A. Well, I was taken so that I couldn't talk, around Thanksgiving 1917.

Q. Yes?—A. And I continued on, to carry on my service up until at times I was confined to the barracks on account of my condition.

Q. Were you in a hospital during any of that time, Mr. Cox?—A. I would only go to the infirmary, and they was so filled up that I couldn't get in, and they confined me to quarters.

Q. Well, do you know? What were they treating you for at that time?—A. They were treating me for my voice and for rheumatism.

Q. What kind of rheumatism, if you know?—A. I had trouble with my knees; could hardly get about.

Q. And what other disability, if any, did you have? (R. 43.)—A. How was that?

Q. What other disability, if any, did you have?—A. Well, I had heart trouble after that.

Q. Well, when did that heart trouble start?—A. They found that on me after the 6th of March of 1918.

Q. And how did that heart trouble affect you, Mr. Cox?—A. Well, I was in bed for quite a while, and I was nervous and weak, and I was in the barracks, and they took me out of the barracks; said I couldn't walk up and down the steps, took me out of the barracks, and sent me back to the—it was the overflow of the base hospital, and sent me back to the main hospital and put me on a floor where I wouldn't have to walk around.

Q. Now, when were you discharged from service?—A. That was on the 18th day of June 1918.

Q. Now, Mr. Cox, what was your occupation prior to the time you entered the service?—A. Salesman.

Q. Salesman for what?—A. Well, for the bakeries; bakery salesman.

Q. What were your average earnings prior to the time you went into the service?—A. Well, anywhere from three hundred and fifty to four fifty per month.

By the COURT:

Q. How old a man were you in 1917?—A. I was around 24.

By Mr. DAWSON:

Q. Well, how long had you worked at that occupation (R. 44) before you entered the service?—A. Well, I had been in

the bakeries, around the bakeries, ever since I was around 17 years old.

Q. Yes. What time did you quit school?—A. Well, when I was around about 16; 15 or 16; I couldn't say just exactly.

Q. How far did you go in the public schools, Mr. Cox?—A. I went to fifth grade.

Q. And did you ever have any other education besides that?—A. No, sir.

Q. Now, Mr. Cox, after you were discharged from the service—

The COURT. (interposing). Just one minute.

Mr. DAWSON. Yes.

By the COURT:

Q. What was it you were selling, sir?—A. Bread.

Q. For a bakery?—A. Yes, sir.

Q. Wholesale?—A. Yes, sir.

The COURT. Proceed, sir.

By Mr. DAWSON:

Q. Well, out of that amount that you made there per month did you have any expenses, Mr. Cox?—A. Well, yes, sir; I had some expense on some of it.

Q. Will you just tell us about what they were?—A. Well, I had my own wagons and horses to take care of (R. 45) out of that.

Q. Yes. Now, after you were discharged from service where did you go?—A. I went home.

Q. Where do you mean by "home"?—A. I went back to City Point, Virginia, where I was staying at the time I was drafted in the army.

Q. And how long did you stay there?—A. Well, I stayed there from the time—until in March 1919.

Q. And what were you doing during that period of time from the date of your discharge until March 1919?—A. Well, I used to work for duPont a little before I went in service, and they sent for me and made me come back.

Q. And what were you doing there?—A. I was just a kind of a foreman out on the yard, kept the time cards and things of that kind.

Q. What kind of yard was that?—A. That was on the yard where they unloaded the boxes and things for the gun cotton that was shipped.

Q. And you went back to that job after you came out of the service?—A. Yes, sir.

Q. And how long did you continue on that job?—A. Well, I couldn't say. My condition was in such a shape that they asked me to resign.

By the COURT:

Q. What did you get while you were working after the War, after you came out of the service? (R. 46)—A. Well, it run about—I don't know exactly now what it was, but I think it was 85 cents an hour, I think is what it was. I wouldn't be sure about it.

Q. How many hours a day did you work?—A. Well, sometimes we worked 8 hours, and sometimes we worked 16.

The COURT. Proceed, sir.

By Mr. DAWSON:

Q. And when did they ask you to quit the job there?—A. Along in just before the plant was closed.

Q. And when was that, Mr. Cox?—A. It was in 1919.

Q. The early part of the year or latter part of the year?—A. Early part of the year of '19.

Q. Now, what did you do after the plant closed? Where did you go then?—A. I came to Washington.

Q. And?—A. Came to Arlington County; it was.

Q. Arlington County?—A. Yes.

Q. And what did you do then in the way of work, Mr. Cox?—A. I didn't do anything.

Q. Well, how did you feel during this period of time?—A. Well, I was in the hospital part of the time. and they was giving me treatments most of the time on account of my condition.

Q. Do you recall what you were in? What hospital were (R. 47) you in?—A. I was in Providence Hospital in 1919.

Q. How long were you in Providence Hospital?—A. I don't know exactly how long I was there.

Q. Well, can you give the jury some idea?—A. Well, I know I was there around six weeks, anyhow, or more.

Q. And after you got out of the hospital what did you do?—

A. I went home, didn't do anything, but took up vocational training.

Q. The Government put you in a vocational training?—

A. Yes, sir.

Q. What kind of training did they give you?—A. Book-keeping and stenographic work.

Qd. When did you enter that training, Mr. Cox?—A. What?

Q. When did you enter that training?—A. Some time in '19, the spring of '19. 1919.

Q. And how long do you recall that you continued in that training?—A. Well, I continued in there, only at times I couldn't go; some months it would be ten days, and some it wouldn't be that much, and some a little more. I couldn't say exactly.

Q. Why couldn't you go?—A. Well, I was in such a condition that I couldn't travel.

Q. Well, tell the jury just how you felt?—A. I was nervous and weak, and my chest bothered me (R. 48), and I just couldn't walk.

By the COURT:

Q. Did you complete the fifth grade?—A. Well, I couldn't say that I did.

Q. Well, do you know you didn't go any further than the fifth grade?—A. Well, it was the schools then, we had no grades when I went to school.

Q. Well, they didn't when I went, either, but you estimate the fifth grade, do you?—A. Well, that's what the report shows when I took the examination in the army.

Q. Yes. And with that sort of education they attempted to give you vocational training in bookkeeping and stenography?—A. Yes, sir.

The COURT. Proceed.

By Mr. DAWSON:

Q.: Did they give you accounting, too, Mr. Cox?—A. Yes, sir. I went to night school a while at Strayer's for accountancy.

Q. Who picked the courses out for you?—A. They were picked out by the Government officials; you know, the ones that were in charge.

Q. They told you what kind of training you were to have?—A. Yes, sir.

Q. Well, now, how long do you remember you were in training, Mr. Cox?—A. Well, I was in training from '19 up until the winter (R. 49) of 1922.

Q. Did the Government pay you while you were in training?—A. Yes, sir.

Q. How much did they pay you?—A. Well, at first we got \$95, and then they raised it to one thirty-five.

Q. Were all the vocational training students paid the same as you were?—A. Yes, sir.

Q. Was that for your maintenance and support during the time you were going to school?—A. Yes, sir. That was for married men. The married men got ninety-five at first, and the single ones got, I think it was, eighty or eighty-five; I don't know just exactly.

Q. They were all paid alike?—A. Yes, sir.

Q. Except whether they were married or single?—A. Yes, sir.

Q. Is that right?—A. Yes, sir.

Q. Now, Mr. Cox, what did you do after you were out of training?—A. Well—

Q. Were you working?—A. Well, they took me out of school, said I wasn't able to go to school and carry on the operation that they were giving me.

Q. You didn't complete your training, then?—A. No, sir; I did not (R. 50).

Q. Well, then after they took you out of school where did you go?—A. I went back home.

Q. What do you mean? Your home in Virginia?—A. Yes, sir.

Q. And how long did you stay there?—A. Well, I was there—the second day I went out they said that I was able to work.

Mr. SPELL. I object to what they said, your Honor, and ask that that be stricken. That is hearsay.

By the COURT:

Q. You say the second day what?—A. The second day I went back home; that is, after I went out of the hospital.

Q. Who said you were able to work?—A. The doctors at Walter Reed Hospital.

The COURT. The Court won't strike that out. Proceed.

By Mr. DAWSON:

Q. Now, what did you do then? Did you go back to work?—A. I tried to work. I started up a ladder at home, to put a roof on a shed I had onto the house there. I got to the top of the ladder, and I fell off.

Q. And do you know what happened to you after that?—A. The Public Health Center sent over after me, and they took me over and treated my leg. I turned my foot in; I didn't break it. And they had to take and cut my shoe off of my foot, and turned it in, and I was on crutches for six weeks.

By the COURT:

Q. Well, now, you say you fell off the ladder. I might (R. 51) fall off a ladder. Why did you fall off the ladder?—A. Well, it was my condition.

Q. What was it?—A. My arms give away on me when I went up the ladder.

The COURT. Proceed.

By Mr. DAWSON:

Q. Then what did you do after that, Mr. Cox?—A. They sent me back to Walter Reed Hospital.

Q. And how long did you remain in Walter Reed Hospital?—A. I stayed in Walter Reed until December; I believe it was the 13th or 14th, some—

Q. What year, Mr. Cox?—A. 1919. I mean 1922.

Q. 1922?—A. Yes, sir.

Q. Yes. And then after you got out of Walter Reed where did you go?—A. I just went home and stayed there at home.

Q. And during all this period of time how were you feeling?—A. In a weak and nervous condition.

Q. What else? Tell us about it.—A. Just nervous and weak, couldn't do anything. If I tried to do anything I just give out.

Q. Shortness of breath?—A. Yes, sir.

Q. Or anything like that?—A. Yes, sir.

Q. Now, after you got back from Walter Reed did you go (R. 52) to work again or attempt to work again?—A. I didn't until they said there was a vacancy on the mail route for substitute carrier.

By the COURT:

Q. Where?—A. In Arlington County.

By Mr. DAWSON:

Q. And did you apply for the job yourself?—A. Well, they sent for me. I had applied for it before that: if they had a vacancy, to hold it for me.

Q. And did you get that job?—A. Yes, sir.

Q. Who was the Postmaster at that time?—A. Mrs. White. Mrs. Grace White.

Q. Mrs. Grace White?—A. Yes, sir.

Q. And was there later a Mrs. Groves that was Postmaster there?—A. Well, that's the Mrs. Groves now.

Q. Now, did you have to take any examination to get that job?—A. No, sir.

Q. And who was the regular mail carrier during that period of time, if you know?—A. Mr. Sidney Harmon Smith.

Q. Now, Mr. Cox, did you ever substitute part of the time for Mr. Smith?—A. Yes, sir.

Q. Tell the jury just about how many times you acted as (R. 53) substitute mail carrier over there.—A. Well, it wasn't very much. It would run about 15 days to a month—a year. Something like that.

Q. Well, were there times when you put in more time than that?—A. Yes, sir. At Christmastime I would help around the post office there and helped carry part of the route.

By the COURT:

Q. What year was that, sir?—A. That was from 1927 on until they closed the post office in Arlington.

Q. And when was that?—A. To my recollection it's around '36, was about nine years.

By Mr. DAWSON:

Q. Did you go as a substitute mail carrier every time they called you?—A. Well, no, sir.

Q. And who was your immediate superior while you were on that job?—A. Mrs. Grace White, Postmistress.

Q. Why didn't you go on every time they called you, Mr. Cox?—A. Well, I was sick——

Mr. SPELL (interposing). I object to that question, your Honor.

A. (Continuing.) And couldn't travel.

The COURT. How would you frame a question of that kind?

Mr. SPELL. Well, your Honor, there may be various reasons (R. 54) why he didn't go. If he would say, "Did sickness prevent you from taking any of the assignments offered you?" why, I wouldn't object to it——

The COURT. That would be leading.

Mr. SPELL. But there may be many reasons why he didn't go.

The COURT. That would be a leading question. If you don't object to it I presume counsel will ask it.

Mr. MILLER. Ask him the question.

Mr. DAWSON. I didn't hear that.

Mr. MILLER. Did sickness cause you to not go when you were called?

By Mr. DAWSON:

Q. Did sickness cause you not to go when you were called, Mr. Cox?—A. Yes, sir.

Mr. DAWSON. The question I had in mind, your Honor, was: How did you feel on those mornings that they called you to go on the mail route and you didn't go?

The WITNESS. I was weak and nervous, and I was afraid to drive my car.

By Mr. DAWSON:

Q. Now, Mr. Cox, tell the jury just how—when you attempted to work, what would happen to you.—A. Well, sometimes that I'd get out and try to work, and I would have to go and get some ammonia or something, so that I could keep agoing.

Q. I want you to tell them just what—A. And then it would— (R. 55).

Q. Were you hurt, if you did, and how you felt, in your own language.—A. Well, I would have awful pains in my chest. I would be nervous and weak from trying to work, and just couldn't travel, just have to go and lay down.

Q. But you tried to work?—A. Yes, sir; I tried to work.

Q. Now, up to the present time, the time you take this substitute mail carrier's job, what kind of work had you tried to do?—A. At the present time?

Q. No; I mean up to the time you took the substitute mail carrier's job.—A. I hadn't done anything except, well, I tried to do little things around home.

Q. Well, had you tried to take some other jobs? Had you?—A. No.

Q. You tried to do some other—A. No. Not at that time; no, sir.

Q. Now, how much did the Government pay you for this work as substitute mail carrier?—A. Well, it pays according to the mileage that you have on the route. Sometimes we got four and a half a day; that is, to furnish our own car and gas. And then towards the last we got around six and sometimes seven dollars.

By the COURT:

Q. Well, now, when was about the last; sir?—A. Around '36 (R. 56).

Q. Well, did I misunderstand you in saying that you worked also in '27?—A. I carried the mail in '27. I started in January of '27.

Q. And how long did you continue?—A. Well, I continued up until '36.

Mr. MILLER. If your Honor please, I believe that probably counsel will stipulate the number of days each year. They have a record—certainly I don't—of the time that he worked, the number of days per year. That might at this stage facilitate matters.

The COURT. Can you reach an agreement?

Mr. SPELL. We have a person subpoenaed with the pay roll records. We intend to show that during our case.

The COURT. Well, if you can agree; that's all.

Mr. MILLER. Well, I think you have a summary of that, don't you?

Mr. SPELL. I don't know whether the summary is complete or not. He has the original records, and he is familiar with them.

Mr. MILLER. Very well.

Mr. SPELL. And I think he can present them better than possibly I can.

Mr. MILLER. When will he be here?

Mr. SPELL. We will put him on during our case.

Mr. MILLER. Well, if he is coming down here, there is no question about the records.

Mr. DAWSON. We don't dispute it, your Honor; this man's work (R. 57).

Mr. MILLER. We don't dispute the number of days.

Mr. DAWSON. It is so little, it didn't amount to anything.

Mr. MILLER. I think the most it ran from about 12 to 63 days a year.

Mr. DAWSON. Very well.

The COURT. Yes.

By Mr. DAWSON:

Q. Now, Mr. Cox, in addition to the mail job, this substitute mail carrier, did you have any other work?—A. After that I tried to do painting; I tried to do paperhanging.

Q. And for whom?—A. Well, just different, only my friends around.

Q. What do you mean? Near, in your neighborhood there?—A. Yes, sir. Around in the neighborhood and around. Sometimes I tried to get new houses to do too.

Q. Whom did you buy your paper from, if you can remember?—A. I bought the most of it from the Leader paper place on Seventh Street.

Q. And who is the proprietor of that?—A. Mr. Kaplan.

Q. Now, how many houses did you paper or attempt to paper?—A. Well, I couldn't say exactly. I wouldn't attempt to, to try to number the ones and the time that I was there, but I didn't do any of the work myself.

Q. Well, what did you do? Did you hire some work done?—A. I put it out under other fellows to do the work.

Q. And did you drive the truck that you used in connection with that job? (R. 58.)—A. No, sir; I did not.

Q. Do you drive a car yourself?—A. Yes; I drive a car.

Q. Now, who worked for you while you were on this paper and painting job?—A. Well, Mr. Kaplan's brother-in-law worked for me for a while.

Q. What is his name?—A. His name is Myers.

Q. Now, who else worked for you?—A. Well, there has been different ones, some that I don't even know the names.

Q. Well, give me the names of—A. There is a Mr. Barnett is one, and—

Q. Did a Mr. Harris work for you?—A. Yes; a Mr. Harris did painting. He is not a paperhanger. He is a painter.

Q. And how much, Mr. Cox, did you earn on that class of work?—A. Well, sometimes you make on those contracts a little bit.

Q. What do you mean by "a little bit"?—A. Well—

Q. Give an idea just about how much you made on them.—

A. Depend upon the contract. There were some of them they only ran a hundred dollars a house for papering and painting, but by the time you pay your labor you average maybe \$10 on a house.

Q. And how many houses do you think that you have had (R. 59) papered or painted while you made a profit of \$10?—

A. Well, I imagine it would be around ten of them, something like that.

Q. About ten houses?—A. Yes; about ten of those.

Q. Well, how many have you papered and painted altogether?—A. Well, I—

Q. According to your best estimate. Your recollection, I mean.—A. I'll say around about 20 or 25.

Q. How much money have you made since you went into this paper and papering and painting business?—A. I hadn't made anything; just a pastime more than anything else.

Q. Yes. Now, since you left the job as assistant mail carrier or substitute mail carrier there, what have you done, Mr. Cox?—A. What.

Q. What work have you done?—A. I haven't done anything myself.

Q. Well, what do you do? How do you spend your days?—A. Well, I just go around and look after these things when I am able to go, or try to put a competent man on the place, some—on the jobs, and I go out and see about those and drive around like that to see how things are going on those jobs.

Q. Well, that is only taking a part of your time. What else do you do?—A. Well, I hardly ever go anywhere unless to visit some (R. 60) of my friends, my sister, or someone around; things like that.

Q. You stay at home, do you?—A. Most of the time.

Q. Well, where are you in your home?—A. Well, most of the time I'm laying around in bed.

Q. At the time you were examined right after discharge, for your heart disability, did the doctors make any recommendation as to whether you should work or not?

Mr. SPELL. I object to that, your Honor.

The WITNESS. They asked me not to do anything.

Mr. SPELL. What they recommended.

The COURT. Overrule the objection. Proceed.

The WITNESS. I was asked not to do anything.

By Mr. DAWSON:

Q. When was that, Mr. Cox?

Mr. SPELL. I ask——

The WITNESS. That was in 1919.

By Mr. DAWSON:

Q. And those were the Government doctors that told you that?—A. Yes, sir.

Q. The time they took you out of vocational training did the Government doctors make any recommendation to you as part of your treatment?

Mr. SPELL. I object to that also on the ground of incompetence, irrelevance, and immateriality.

The COURT. Objection overruled. Proceed.

The WITNESS. I was told not—that I was—when I went to Walter Reed Hospital I asked Dr. Crimmin, the doctor that (R. 61) examined me and sent me to Walter Reed—I asked Dr. Crimmin to let me go back to school because I had to have money to take care of my home with, and let me keep on.

He asked me what good was an educated corpse, is the very words that Dr. Crimmin spoke to me.

By Mr. DAWSON:

Q. Now, Mr. Cox, during the past years that you have been at home, as far as your health is concerned have you followed the advice of your physicians and of the Government physicians?—A. I certainly have.

Q. And what have you done in reference to that advice?—A. I have tried to lay down and rest like they asked me to, and I haven't abused myself any.

Q. Did anybody give you any recommendation as to your treatment for your tuberculosis?—A. Well, the doctors did in 1919.

Mr. SPELL. I object to that on the grounds that the doctor is the proper person to testify as to what recommendation he made.

The COURT. Objection overruled.

Mr. SPELL. It is hearsay on the plaintiff's part.

The COURT. The objection is overruled.

By Mr. DAWSON:

Q. That was a Government doctor?—A. Yes, sir.

Q. Was it, Mr. Cox?—A. Yes, sir.

Q. Well, what did he tell you about your—— (R. 62)—
A. (Interposing.) And he wanted to send me to Arizona at first, and then he tried to send me to South Carolina to the camp, and I asked him to let me stay at home.

Q. Why did you ask him to let you stay home?—A. I told him I had lived in the country where I had plenty of fresh air and where I could have my own milk and my own eggs to do with at home.

Q. And have you followed the advice?—A. I followed that advice until they won't let me have anything like that around where I live now, because it's too thickly settled.

Q. What did you do as a result of what the doctor told you at that time?—A. Well, I laid around and rested at home.

Q. Now, Mr. Cox, from the time in 1918 down to the present time have your disabilities been the same over that period of time?—A. Yes, sir.

Q. Just tell us about them.—A. Yes.

The COURT. From what time?

Mr. DAWSON. From 1918 down to the present time.

The WITNESS. Yes, sir. At times I feel fairly good and try to get out and do things, and I make myself worse by doing it.

By Mr. DAWSON:

Q. Have you been suffering from—have you had the same feelings—A. (Interposing.) Yes, sir; I have (R. 63).

Q. From that time down—now, just a minute until I get through, Mr. Cox, please—from 1918 down to the present time? Has it been the same feelings that you have had during all this period of time, or, in other words, the same disabilities?—A. Yes, sir. Same.

Mr. SPELL. I object.

The WITNESS. Same thing.

Mr. SPELL. I object to the disabilities. He can testify—

The COURT. Well, what he means, of course, as far as he knows, he's suffered with the same disability because he has felt just the same. That is what he evidently means.

Mr. DAWSON. Yes.

Mr. SPELL. If that is what counsel means, I don't object to it.

The COURT. The jury understands. The jury knows he is not a doctor. The Court overrules the objection.

By Mr. DAWSON:

Q. Just tell us about that.—A. Well, I felt the same way: weak and nervous, and except in 1927 I got so I could speak above a whisper.

Q. In other words, with that exception?—A. And that is the only change that has been made in my condition since I left the base hospital at Camp Lee, Virginia.

Q. Do you still have pains in your chest?—A. Yes, sir.

Q. Have you had those pains in your chest since 1918 down to the present time?—A. Yes sir; I have (R. 64).

Q. Do you still have pains around your heart?—A. Yes, sir.

Q. And have you had those pains around your heart from 1918 every year?—A. I certainly have.

Q. Down to the present time?—A. Yes, sir. And I am so sore this morning that I can hardly sit up, this morning.

Q. Now, have you been nervous since 1918 down to the present time?—A. Yes, sir.

Q. And is your condition the same in that regard, as far as you know, since 1918, every year down to the present time?—A. Yes, sir.

Mr. SPELL. I object to these continual leading questions, your Honor.

The COURT. Of course the questions are leading, but when you want to object on the ground that a question is leading you have to make a specific statement of the ground of your objection. The Court sustains your objection to the last question, but the Court cannot strike out the answers to the preceding questions, because there was no objection to them.

Mr. SPELL. I realize that, and I don't want to pin down counsel too much, but he insists upon putting one leading question after another, and I ask that he not do so in the future.

Mr. DAWSON. Well, I am just getting the facts in this case.

The COURT. The Court has ruled (R. 65).

* * * * *

Q. Mr. Cox, during the time that you were employed as a substitute mail carrier there, how many days did you average

a year?—A. Well, something like, about two weeks or maybe a month.

Q. On the average of a month a year, do you think?—A. A year, something like that.

Q. Will you please tell the Court and jury why you couldn't do that work?—A. On account of my health. My condition was so that I was nervous, weak, and couldn't get out to do anything.

Q. Well, what would happen at the end of the day?—A. Well, I would be—when I had to carry mail I would be so broken down and all that I could hardly make it home.

Q. Who knows about that, your condition during that period of time?—A. The postmaster.

Q. What is her name? (R. 67)—A. Mrs. White it was at that time. She married a Mr. Groves.

Q. What is her name now?—A. Mrs. Groves.

Q. Did you carry mail yourself or did you have an automobile?—A. I had an automobile.

Q. Did you have any help in connection with the delivery of your mail?—A. Sometimes, around Christmas time I had a boy to carry bundles and things for me.

Q. Now, when that work terminated as substitute mail carrier, did you apply to the Government or to anyone for any other job in the Post Office Department?—A. I did, when they were ready to close the post office at Ballston, I tried to carry mail, to be substitute to the new post office.

Q. Who did you apply to?—A. I applied to Mr. Maurice Simpson and he turned me over to Mr. Walker.

Q. What was their official position?—A. Well, they were getting everything ready for the new post office. All the men have to go before these two inspectors, Mr. Simpson and Mr. Walker.

Q. Did you get the job?—A. No, sir; they turned me down on account of my heart.

Q. Now, Mr. Cox, are you a married man?—A. I was; yes, sir.

Q. Well, when and where were you married? (R. 68.)—A. In Petersburg, Virginia, in 1915.

Q. What is the date?—A. December 22nd.

Q. How many times have you been married?—A. Once.

Q. Did you live with your wife?—A. Yes, sir.

Q. Until about what time?—A. Until 1926.

Q. Have you lived with her since?—A. No, sir.

Q. Have you been separated since 1926?—A. Since 1926.

Q. Now, the time you left the service, did you have any property of any kind or cash in the bank?—A. I had cash in the bank and I bought some property.

Q. How much money did you have in the bank?—A. I had about \$1,800 when I came in the service.

Q. Where did you get that money?—A. I made that before the war.

Q. You had it when you came out of the service?—A. Yes, sir.

Q. Now, did you buy any property with the money?—A. Yes, sir.

Q. What property?—A. I paid down on some property.

Q. Where is the property?—A. In Arlington, Virginia.

Q. Is that where you now live? (R. 69.)—A. The house that I live in now, yes, sir; it was, but I sold that to my father in 1925—1924 I believe it was.

Q. For what reason did you sell it to your father?—A. Well, I needed some cash money.

Q. What did you need the money for?—A. Well, I needed some money for my affairs at home. On account of the new child was born.

Q. You have a child?—A. Yes, sir.

Q. Is it a boy or girl?—A. A girl.

Q. When was she born?—A. She was born—let me see, it was I think the 19th of November.

Q. Now, do you have any source of income?—A. Nothing but what little compensation I get from the Government.

Q. How much compensation do you draw?—A. My compensation calls for \$50 a month. Twenty dollars of it goes to take care of my child and my wife.

Q. In other words, you got \$30 yourself?—A. Yes, sir; \$30 a month.

Q. Do you know why the Veterans' Bureau is paying you that compensation?—A. It is for lung trouble.

Q. Now, in taking care of your health, during 1918 down to the present time, have you followed doctors' orders?—A. Yes, sir. I found that if anything didn't agree with me in any way or hurt me in any way I tried to refrain from (R. 70) using it or doing anything—I didn't drink. I didn't even smoke. I used to smoke and I quit smoking on account of it. I think that that gives me better breath and I could get about better.

Q. Do you have shortness of breath?—A. Yes, sir.

Q. Upon exertion?—A. Yes, sir. I can't bend over or anything like that. If I do I feel like I am going on my head on account of dizziness.

Q. How long has that condition existed?—A. Since 1918.

Q. Every year?—A. Yes, sir.

Q. Down to the present time?—A. Yes, sir.

Q. Mr. Cox, when did you first know that you had a right to apply for and claim the insurance?—A. Around 1930.

Q. Where did you find out about that?—A. It was one of my friends that lived in the neighborhood came to my door and he told me that he had filed a claim for his and he thought that I had the same thing.

Q. What did you do?—A. Then I made arrangements with Mr. Miller to see about that for me.

Q. Do you recall when you filed your claim with the Veterans' Bureau?—A. What?

Q. Do you recall when you filed your claim with the (R. 71) Veterans' Bureau? Do you recall approximately the date when you filed the claim?—A. Somewhere around about 1930.

Q. In the early part of the year or the latter part of the year?—A. I don't know. I think it is the early part if I am not mistaken because I kept no record of this thing anyway.

Q. Prior to this time, did you know that you had rights under your insurance contract?—A. No, sir; I didn't.

Q. Were you ever given a contract? Did the Veterans' Bureau give you a policy?—A. I had a policy when—that is from the Army—the insurance from the Army.

Q. The only thing you got are the certificates that were issued during 1918?—A. And the receipts back from the insurance.

Q. Mr. Cox, do you recall how much premium you paid while you were in the Army?—A. I don't know. It started something like about six-twenty and ended around something between seven and seven-twenty. I don't know just exactly because my papers got misplaced.

Q. You paid the premium from the date you signed your application until what time?—A. That was from the first part of 1918, as well as I can recollect, was when the insurance was issued in 1918, but that was taken out of my government pay while I was in the Service.

Q. After you got out of the Service you still continued (R. 72) to pay your premium?—A. Yes.

Q. How long did you continue to pay them?—A. Up until 1927.

Q. Did you pay each month?—A. Yes, sir; paid each month, sometimes I would run a little short and a check would come back and then send another one as soon as I got it back.

Mr. DAWSON. I think that is all, your Honor.

Cross-examination by Mr. SPELL:

Q. Mr. Cox, you were married December 22d, 1915, weren't you?—A. Yes, sir.

Q. Whom did you marry?—A. I married a Miss McClean from North Carolina, Judge McClean's daughter.

Q. You entered the service on September 18, 1917, at Charlottesville, Virginia, didn't you?—A. Yes, sir.

Q. You did?—A. Yes, sir.

Q. You were discharged from the service on June 17, 1918, at Camp Lee, Virginia?—A. Yes, sir.

Q. Where did you go after you left the Service?—A. I went back to Cedar Point where I was living at the time I was drafted into the Army.

Q. On September 16, 1918, did you accept a position at Hopewell, Virginia? The du Pont Company? (R. 73.)—A. Yes, sir.

Q. What was your position there?—A. I was considered a foreman of the yards.

Q. How much were you paid an hour, Mr. Cox?—A. I couldn't say now for sure how much it was.

Q. Was it 80 cents an hour?—A. I was paid when I went back in there a salary very similar. They raised me after I was in there and of course I worked overtime and we got time and a half for it. I couldn't say just exactly how much it was.

By the COURT:

Q. You testified this morning that it was 85 cents an hour.—A. Yes, I got 85 cents an hour part of the time.

By Mr. SPELL:

Q. You ended your employment when the plant closed down, didn't you?—A. They asked me to resign.

Q. Did you resign?—A. Yes, sir; I certainly did.

Q. Was it a written resignation?—A. No, sir; I just turned in my stuff that I had and left.

Q. How soon thereafter did the plant close down?—A. I couldn't tell you what date it closed down.

Q. Was it three or four days later?—A. It was a month or two weeks.

Q. On May 1st, 1919, you entered National Training, didn't you? (R. 74.)—A. Some time around that time.

Q. Your objective was to be an office assistant, was it not?—A. Yes.

Q. Where did you receive that training?—A. Strayer's Business College.

Q. You also received training at the Stewart Business College?—A. No, sir; I didn't.

Q. Is Strayer's Business College located in Washington?—A. Yes; in the old Masonic Temple at Ninth and F Streets. I think they moved from there to Twelfth Street, next to the telephone exchange—or was it Thirteenth? I can't say exactly.

Q. You went in National Training for a period of four months?—A. Something like that.

Q. Your last training was on August 31st, 1922, wasn't it?—A. What?

Q. Your last training that you received was on August 31st, 1922?—A. No, sir. I left training to go to Walter Reed Hospital, just as well as I could recall was—it was when the Knickerbocker Theatre fell in.

Q. How long were you in Washington?—A. I lived in Washington about four or five months.

Q. When did you buy some property in Ballston, Virginia?—A. In 1919, and then I bought another piece in 1922, and I sold that to my father.

Q. The piece that you bought in 1919, how many acres was (R. 75) that?—A. Half an acre.

Q. You cultivated the garden on that plot for a few years?—A. Yes.

Q. You recently sold for a profit that land within the last year?—A. My mother did; I didn't. I didn't own anything over there any more.

Q. When did you sell that land to your mother?—A. That land was sold to my mother when my wife and I separated.

Q. I am talking about the plot on which you cultivated a garden.—A. That was sold to my mother at the same time that this was sold. At the time of my separation. It was sold to my mother in 1927.

Q. And some of that money went to your wife; is that right?—A. No, sir. I gave her a house that we lived in. It was \$1,300 against that. I gave that to her. I had another piece that I had tried to build on; she wouldn't sign no contract for me. I gave that to her. I owed \$1,055 on that besides the interest.

Q. Mr. Cox, you kept chickens, hogs, and cows until recently on that plot?—A. No, sir; I haven't.

Q. When did you get rid of them?—A. I haven't had any since my separation. The ones that (R. 76) were there didn't belong to me.

Q. Didn't you sell a cow to Mr. Pfeifer?—A. I sold Mr. Pfeifer a cow in 1926.

Q. Do you mean to tell this jury that you haven't had a cow or chicken since 1926?—A. I didn't say I didn't have a cow or chicken since 1926. I said that I sold the last cow that I owned to Mr. Pfeifer in 1926. I had a cow of Mr. Pfeifer

and kept it about two years and a party that takes care of my home for me gave the lady a cow. I haven't owned a cow since.

Q. But the cow was on the premises until recently?—A. Yes, sir.

Q. You benefited from the milk from the cow, didn't you?—A. Yes, sir.

Q. Did you have any fruit trees on the plot?—A. Maybe a couple of apple trees on that.

Q. How many chickens do you raise on that?—A. I didn't raise any more because I had to keep them very close to my house.

Q. What is the size of your vegetable garden?—A. I never sold any vegetables.

Q. How large is your vegetable garden?—A. Well, I would say maybe a quarter of an acre. I didn't work it myself.

Q. When did Mr. Chaser come to live with you?—A. About 11 years ago.

Q. Has he lived continuously with you since then?—A. Yes, sir.

Q. Have you worked in this garden with Mr. Chaser? (R. 77.)—A. He worked it himself.

Q. You helped him?—A. Very little that I have done in the garden because I can't do it.

Q. How much do you pay Mr. Chaser?—A. I don't pay him anything.

Q. Does he stay at your home?—A. He helps other people around there and he helps me and goes out and helps many other people.

Q. Do you furnish his room and board?—A. Yes.

Q. Do you give him spending money?—A. No, sir; I don't.

Q. Does he furnish his clothes?—A. Well, people give them to him because the boy can't read or write (R. 78).

* * * *

Q. Mr. Cox, I believe you said you disposed of a house and lot in 1926. Since you have been on the stand, is your memory refreshed to the extent that you now think that you sold that house to your father?—A. Yes, sir; I did.

Q. Your father and not your mother?—A. I sold the house to my father. I had two pieces of property.

Q. And you sold both to your father?—A. No, sir; I sold the ground to my mother after my father's death.

Q. Before your father's death, you sold the house?—A. Yes, sir.

Q. Has that estate been divided? (R. 85.)—A. No, sir; it has not.

Q. You have an interest in it?—A. Nothing has been divided among the children.

Q. Have you an interest in that home right now?—A. Yes, sir.

Q. Do you pay the taxes on the property?—A. I help my mother with them whenever I have anything. My mother helps take care of me.

Q. You don't pay any rent, in other words?—A. No, sir; I don't pay any rent. My mother supplies me with money sometimes if I need it.

Q. Does your mother live with you?—A. She stays with me part of the time and part of the time with my sister and with my brother part of the time.

Q. How old is your mother?—A. My mother is 74 years old.

Q. What other property does she have besides this house and lot?

Mr. DAWSON. That is objected to.

The COURT. I don't know that it is objectionable. There has been a lot of talk about property in this case and it may be relevant.

The WITNESS. My mother owns a farm that my father had in Albemarle County, Virginia—a little over 200 acres.

The COURT. Unless that leads up to something else, the Court thinks that that should be stricken out because it has no bearing upon the case.

Mr. SPELL. Well, that is all right.

The COURT. Strike out that testimony, Mr. Reporter (R. 86).

By Mr. SPELL:

Q. On December 3rd, 1924, your wife gave birth to a child?—A. Yes, sir.

Q. That child died on July 23rd, 1926; didn't it?—A. Yes, sir.

Q. She gave birth to a second child on November 19, 1925?—A. That child is living.

Q. With your wife?—A. Yes, sir.

Q. You separated from your wife in June 1926, didn't you?—A. Well——

Q. Or thereabouts?—A. Thereabouts, but it was before that.

Q. It was in 1926?—A. I never left home until after my father's death. I stayed there up until December. My father was buried December 13th.

Q. You don't have a divorce from your wife, do you?—A. No, sir.

Q. Do you contribute to her support?—A. Twenty dollars is sent to her every month from the Government, from my compensation.

Q. What other support do you give her?—A. She has a job of her own at the Veterans' Bureau on my disability.

Q. Have you contributed anything other than the compensation? (R. 87.)—A. No, sir. I gave her a home when I left.

By the COURT:

Q. You say she holds a job on your disability?—A. Yes, sir.

Q. What do you mean?—A. She got in the Veterans' Bureau upon my disability. Senator Lyon from North Carolina got her job back. She lost her job on account of being married and Senator Lyon her mother partly raised, so Senator Lyon got the job back at the Veterans' Bureau on my disability.

By the COURT:

Q. What does she get?—A. The last account that I heard she had \$1,800 but I understand that she has got a higher rating now in the Veterans' Bureau. She went back to school and studied some more.

By Mr. SPELL:

Q. Mr. Cox, you have a housekeeper, don't you?—A. No, sir; I don't.

Q. What position does Mae Clem have in your household?—A. She helps my mother. My mother stays there with me part of the time.

Q. How much time does your mother stay there?—A. About a third of the year and sometimes more.

Q. Does Miss Mae Clem stay there continuously?—A. Yes, sir.

Q. While your mother is away?—A. Yes, sir.

Q. How long has she been in the house?—A. About ten years (R. 88).

Q. How much do you pay her a week?—A. What?

Q. Do you furnish her board and room?—A. She makes her own board and room because she has her two nephews with her.

Q. They board with you and pay her?—A. Yes, sir.

Q. They live in the house?—A. Yes, sir.

Q. You also have an adopted daughter with you?—A. I haven't adopted any.

Q. There is an infant living with you?—A. Yes.

Q. How long has she been there?—A. She has been there for—ever since she was a year old; before she was a year old.

Q. How long ago?—A. She is six years old now; about five years. I would say about five.

Q. She is dependent upon you for support, isn't she?—A. No, sir.

Q. Then where does she get her support?—A. From Miss Clem.

Q. Miss Clem doesn't work outside of your home?—A. Well, she makes a living there.

Q. In your home?—A. Her nephews look after her.

Q. Other than that she doesn't have any means of support, does she. (R. 89.)—A. No, sir.

Q. There is another young man there. What is his name who is living with you?—A. Several lives there.

Q. Mr. Chaser, how long has he been with you?—A. About 11 years.

Q. Do you furnish his room and board?—Yes, sir.

By the COURT:

Q. What is that?

Mr. SPELL. Mr. Chaser.

The WITNESS. He does work for me—different things I have to do that I can't leave and do.

Q. I think you said you don't pay him a salary?—A. I don't.

Q. Well, doesn't he operate your truck, Mr. Cox?—A. He takes the truck out occasionally.

Q. Doesn't he drive it at your instruction?—A. I never bothered.

Q. Who pays for the gas bill for your truck?—A. Well, whatever comes in—what the truck does pays it.

Q. The surplus is paid over to you, isn't it?—A. Yes.

By the COURT:

Q. What?

Mr. SPELL. He said he pays the gas out of what the truck would bring in and the surplus was paid to him.

The WITNESS. Yes.

By Mr. SPELL (R. 90):

Q. How much do you average a month on the truck?—A. Maybe fifteen or twenty dollars.

Q. You hauled brush from the land that was being cleared off and things of that nature?—A. Sometimes, that is, whenever people called in and wanted something like that.

Q. You also deliver coal, don't you?—A. No, sir. He delivered a little coal a few weeks ago to a man in the neighborhood that asked him to come over and take the coal.

Q. Who bought the license for that truck?—A. They are bought in my name.

Q. Since when have you bought the license for the truck? How long have you had the truck?—A. For quite a while. I couldn't say how long.

Q. In other words you have owned the truck since 1926, haven't you?—A. I guess it has been.

Q. Have you bought the license for the truck?—A. Yes.

Q. In your own name?—A. Yes, sir.

Q. On August 23d, 1926, you purchased your first truck, didn't you?—A. What?

Q. On August 23d, 1926, you purchased your first truck, didn't you?—A. Somewhere along that time.

Q. From whom did you buy that truck? (R. 91.)—A. Arlington Motor Company.

Q. How much did you pay for it?—A. I don't know exactly now. Somewhere around eight or nine hundred dollars.

Q. What kind of truck was it?—A. A Ford truck.

Q. Did you buy it new?—A. Yes.

Q. What capacity was it?—A. A ton.

Q. A ton truck?—A. Yes, sir.

Q. How long did you keep that particular truck, Mr. Cox?—
A. I kept it up until about three years ago.

Q. Who did you sell it to?—A. I traded it in for a new truck.

Q. That was in April 1937?—A. I don't know just when it was—1932. I said it was a 1932 B. B. used truck.

Q. It was a Ford truck?—A. Yes.

Q. What capacity was it?—A. A ton and a half.

Q. Who did you buy that truck from?—A. Aero Auto Company.

Q. You bought the license on that truck since then, haven't you?—A. Yes, sir.

Q. You traded your first truck in. Now, how much difference did you have to pay? (R. 92.)—A. It was two and something, I think it was. I am not sure. I won't say for sure.

Q. Have you paid that amount?—A. That amount has been paid; yes, sir.

Q. Did you ever do any hauling for Mr. Lawrence W. Douglas, an attorney at Clarendon?—A. Mr. Douglas had the truck up there to get a little wood.

Q. You drove the truck yourself on that particular job?—
A. No, sir; I didn't.

Q. Did you move some logs on that occasion?—A. It was some wood. I always have had someone else to drive. I have never drove.

Q. Who drove it before Mr. Chaser came with you?—A. Mr. Post. It was bought for him in the first place. He is dead and gone now.

Mr. SPELL. May this please be marked "Government Exhibit 1" for identification?

(Document produced by Mr. Spell was marked "Government Exhibit 1" for identification.)

By Mr. SPELL:

Q. Mr. Cox, I hand you a document marked "Government Exhibit 1" for identification, and ask you if you can identify that as your signature.—A. Yes, sir.

Q. Mr. Cox, when did you buy your first passenger automobile?—A. I don't know exactly (R. 93).

Q. Your first passenger automobile was a 1929 Chevrolet coach, wasn't it?—A. I can't recall it.

Q. What year did you buy your first automobile in?—A. I have had several. I can't recall just what year that I got it in.

Q. You traded that in, this 1929 Chevrolet coach, on a 1931 Chevrolet coach, didn't you?—A. Yes, sir.

Q. You made that trade on April 10, 1931, with the Stohlman Chevrolet, Incorporated, 3311 M Street Northwest, Washington, D. C., didn't you?—A. Yes, sir.

Q. How much did you get on the trade-in for the 1929 Chevrolet coach?—A. I can't recall it.

Q. Do you recall how much cash you put up?—A. No, sir; I didn't put up any.

Q. This 1931 Chevrolet coach cost you \$743, didn't it?—A. I don't know what it cost me.

Q. That is about right?—A. I couldn't say for sure because I have no paper to show it.

Q. It was a new car, wasn't it?—A. Yes, sir.

Q. You got a trade-in allowance of \$140 on the 1929 Chevrolet coach?—A. I couldn't tell you now to save my life.

Q. And the remaining \$503 was financed in some notes (R. 94) through the General Motors Acceptance Corporation?—

A. Yes.

Q. You paid off those notes, didn't you?—A. Yes, sir.

Q. When you sold that car, Mr. Cox, that 1931 Chevrolet coach, how much did you receive?—A. I couldn't recall it.

Q. In June 1935 you purchased a Chevrolet club sedan, didn't you?—A. What time?

Q. In June 1935.—A. I don't just exactly know what time it was, but I guess the record would show it.

Q. You don't deny that, do you?—A. No, sir.

Q. You bought the license for that car for every year since 1935 up to and including 1938, didn't you?—A. That is the only way I had to travel because my legs would give in.

Q. How much did you pay for that car?—A. Which one?

Q. The 1934 Chevrolet club sedan.—A. I couldn't say it now. It was between four and five hundred dollars.

Q. To whom did you pay that money?—A. Stohlman.

Q. Have you paid the entire amount?—A. I think so. I haven't heard any complaints from them.

Q. In June 1939 you disposed of that car, didn't you? (R. 95)—A. I don't know just what time it was.

Q. To whom did you sell it, Mr. Cox?—A. I can't recall his name. Marcy, I believe it was.

Q. How much did you get for it?—A. I don't know exactly now.

Q. Well, your best judgment.—A. One hundred—something like that as far as I know now. I don't know just the dollar that was put in.

Q. You were paid cash for it?—A. No, sir.

Q. Has the full amount been paid to you for that car?—A. It was traded in on another used car.

Q. With whom did you trade that?—A. I told you. Marcy Motor Company.

Q. What kind of car did you get in on the trade-in?—A. A 1937 Chrysler.

Q. How much money did you pay for it?—A. I don't know exactly now, because I don't try to carry those things in my mind.

Q. Did you move some logs on that occasion?—A. It was some wood. I always have had someone else to drive. I have never drove.

Q. Who drove it before Mr. Chaser came with you?—A. Mr. Post. It was bought for him in the first place. He is dead and gone now.

Mr. SPELL. May this please be marked "Government Exhibit 1" for identification?

(Document produced by Mr. Spell was marked "Government Exhibit 1" for identification.)

By Mr. SPELL:

Q. Mr. Cox, I hand you a document marked "Government Exhibit 1" for identification, and ask you if you can identify that as your signature.—A. Yes, sir.

Q. Mr. Cox, when did you buy your first passenger automobile?—A. I don't know exactly (R. 93).

Q. Your first passenger automobile was a 1929 Chevrolet coach, wasn't it?—A. I can't recall it.

Q. What year did you buy your first automobile in?—A. I have had several. I can't recall just what year that I got it in.

Q. You traded that in, this 1929 Chevrolet coach, on a 1931 Chevrolet coach, didn't you?—A. Yes, sir.

Q. You made that trade on April 10, 1931, with the Stohlman Chevrolet, Incorporated, 3311 M Street Northwest, Washington, D. C., didn't you?—A. Yes, sir.

Q. How much did you get on the trade-in for the 1929 Chevrolet coach?—A. I can't recall it.

Q. Do you recall how much cash you put up?—A. No, sir; I didn't put up any.

Q. This 1931 Chevrolet coach cost you \$743, didn't it?—A. I don't know what it cost me.

Q. That is about right?—A. I couldn't say for sure because I have no paper to show it.

Q. It was a new car, wasn't it?—A. Yes, sir.

Q. You got a trade-in allowance of \$140 on the 1929 Chevrolet coach?—A. I couldn't tell you now to save my life.

Q. And the remaining \$503 was financed in some notes (R. 94) through the General Motors Acceptance Corporation?—

A. Yes.

Q. You paid off those notes, didn't you?—A. Yes, sir.

Q. When you sold that car, Mr. Cox, that 1931 Chevrolet coach, how much did you receive?—A. I couldn't recall it.

Q. In June 1935 you purchased a Chevrolet club sedan, didn't you?—A. What time?

Q. In June 1935.—A. I don't just exactly know what time it was, but I guess the record would show it.

Q. You don't deny that, do you?—A. No, sir.

Q. You bought the license for that car for every year since 1935 up to and including 1938, didn't you?—A. That is the only way I had to travel because my legs would give in.

Q. How much did you pay for that car?—A. Which one?

Q. The 1934 Chevrolet club sedan.—A. I couldn't say it now. It was between four and five hundred dollars.

Q. To whom did you pay that money?—A. Stohlman.

Q. Have you paid the entire amount?—A. I think so. I haven't heard any complaints from them.

Q. In June 1939 you disposed of that car, didn't you? (R. 95)—A. I don't know just what time it was.

Q. To whom did you sell it, Mr. Cox?—A. I can't recall his name. Marcy, I believe it was.

Q. How much did you get for it?—A. I don't know exactly now.

Q. Well, your best judgment.—A. One hundred—something like that as far as I know now. I don't know just the dollar that was put in.

Q. You were paid cash for it?—A. No, sir.

Q. Has the full amount been paid to you for that car?—A. It was traded in on another used car.

Q. With whom did you trade that?—A. I told you. Marcy Motor Company.

Q. What kind of car did you get in on the trade-in?—A. A 1937 Chrysler.

Q. How much money did you pay for it?—A. I don't know exactly now, because I don't try to carry those things in my mind.

Q. I ask you if the difference was \$518.40?—A. I couldn't say for sure.

Q. I ask you if you didn't get an account from the National Bond & Investment Company of Washington.—A. I couldn't tell you how much it was.

Q. Did you borrow some money from the National Bond & Investment Company?—A. It was turned over to the National Bond & Investment Company.

Q. You were to pay that back in monthly payments of \$28.80 (R. 96) weren't you?—A. Something like that.

Q. How much do you owe on the car now?—A. I couldn't tell you. I am back a little bit on it. I couldn't say just exactly.

Q. You don't owe over \$90 on it?—A. I haven't figured it out.

Q. It is less than \$100, isn't it?—A. I couldn't say because when the last payment is made you get your title sent in to you.

Q. You have a title from the State of Virginia on that car?—A. Yes.

Q. You bought a license for it, also, didn't you?—A. Yes.

Q. Mr. Cox, how many years have you driven an automobile?—A. I have driven an automobile since 1911.

Q. How many miles do you average driving each year?—A. I couldn't say.

Q. Well, your best estimate.—A. I couldn't tell you to save my life.

Q. Do you refuse to estimate it?—A. I don't know just what it would be.

Q. Well, your best estimate if you can give it.—A. I don't know—it was around—some years it would be more than others, 5,000 or more.

Q. How many?—A. Five thousand or more.

Q. Would you make just short trips or long trips? (R. 97)—A. I never made any long trips unless somebody else goes along to drive.

Q. What is the longest trip you have ever made?—A. The longest trip I have ever made was to Florida.

Q. From Arlington to what point in Florida?—A. Miami.

Q. When did you make that trip, Mr. Cox?—A. I don't know whether it was three or four years ago.

By the COURT:

Q. Did you drive yourself?—A. Part of the way.

By Mr. SPELL:

Q. You drove Mr. and Mrs. Robert Pickett?—A. I went down with Mr. and Mrs. Pickett.

Q. You went down to drive them?—A. No, I didn't go down to drive them.

Q. They took you to drive their car from Arlington down to Miami?—A. To Miami, Florida. Mr. Pickett took me along. He said I had been so nice to him that he wanted me to go to Florida with him. He wanted me to go this year but I couldn't go because of my health and my heart trouble.

Q. How much of the way did you drive?—A. Part of it.

Q. Most of it?—A. Well, I guess you would say most of it.

Q. How much time did it take you to get from Arlington to Miami, Florida?—A. Around 36 (R. 98).

Mr. SPELL. May I please have these marked "No. 2, 3, and 4" for identification?

(Documents produced by Mr. Spell were marked "Government Exhibits 2, 3, and 4" for identification.)

By Mr. SPELL:

Q. I hand you documents marked Government Exhibit 2 for identification and ask you if you can identify your signature on it?—A. That is mine.

Q. That is your signature which appears on Government Exhibit 2 for identification?—A. Yes, sir.

Q. I hand you document marked Government Exhibit 3 for identification and ask you if you can identify your signature?—A. Yes, sir; that is mine.

Q. I also hand you document marked Government Exhibit No. 4 for identification and ask you if you can identify your signature.—A. Yes, sir; that is it.

Q. I ask you, Mr. Cox, if the handwriting and the filling in of this form is in your own handwriting. You filled that out, didn't you?—A. Yes, sir.

Q. You are referring to Government Exhibit No. 3 for identification?—A. Yes, sir (R. 99).

Q. I hand you Government Exhibit No. 2 for identification and ask you if that isn't also in your handwriting?—A. Yes; that is mine.

Q. And Government Exhibit No. 4 for identification—I ask you if that also is in your handwriting.—A. Yes, sir.

Q. It is?—A. Yes, sir.

Mr. DAWSON. Is counsel offering them at this time? I would like to look at them before they are offered.

Mr. SPELL. No, I am not offering them yet.

By Mr. SPELL:

Q. In answer to a question in your application for a driver's license, didn't you state, didn't you put beside the question: "Have you any physical or mental disability?" the answer in your own handwriting, "No"?

Mr. DAWSON. Just a minute. These exhibits speak for themselves.

Mr. SPELL. I will offer them in evidence later. I will withdraw that, if your Honor please.

The COURT. It wouldn't be proper cross-examination, anyway.

Mr. SPELL. Yes, I withdraw that, if your Honor please.

By Mr. SPELL:

Q. Mr. Cox, did you begin working as a substitute mail carrier in the post office at Ballston, Virginia, as early as 1923?—A. No, sir.

Q. When did you start working there, Mr. Cox? (R. 100)—A. 1927. January, 1927.

By the COURT:

Q. Where was that?

Mr. SPELL. Ballston, Virginia, post office.

By Mr. SPELL:

Q. In acting as substitute mail carrier, you took over the route when the regular carrier was sick or on vacation, is that correct?—A. When I was able to, yes, sir.

Q. How long was the route?—A. Sometimes it was 22 and up to 35 miles; 34, 35; I don't know just exactly.

Q. Did you drive your own car in this work?—A. Part of the time.

Q. Well, how much of the time did you drive your own car?—A. Well, about a little more than two-thirds of it, I guess.

Q. Whose car did you use when you didn't drive your own?—A. I had somebody else to drive if mine was broken or anything like that.

Q. You drove your own while your car was in operation?—A. Yes, sir, unless I was too bad off I had to take a young fellow and—

Mr. SPELL. That is enough.

The COURT. No, he can answer your question fully.

The WITNESS. Several times I had to get somebody else to drive for me so I could finish the mail route on several occasions.

By Mr. SPELL (R. 101):

Q. How many times did that happen a year?—A. I only carried the mail about a month a year.

Q. Who did you have to help you on those times?—A. Anybody that I could pick up that could drive a car.

Q. Did you have those parties to testify in this court?—A. I couldn't tell, really, I couldn't find them; some of them are gone, some of them are dead.

Q. Can you give the names of those persons so that we may subpoena them into court here?—A. One was Mr. Smith.

Q. What is his name?—A. Oscar L. Smith.

Q. Where does he live?—A. Camden, Tennessee. He used to, I am not sure, but I believe he is dead.

Q. How many times did Mr. Smith drive you?—A. On several occasions.

Q. Who else drove you when you weren't able to complete the route?—A. Miss Lawson, who used to board at home.

Q. What is her given name?—A. Nellie Lawson.

Q. Where does she live?—A. I couldn't tell you.

Q. How many times did she drive?—A. She was with me on several occasions.

Q. Who else drove you?—A. That is about all. There was a boy that used to go with me but he got killed in Washington. His name is Charles (R. 102) Rose.

Q. He didn't go with you much, did he?—A. Yes, he did.

Q. How many times did he go with you?—A. His uncle boarded with me and he stayed with his uncle.

Q. How many times did he go with you?—A. A dozen times or more. I didn't say he drove all the time, but he delivered the mail and stuff.

Q. Anybody else?—A. That is about all, I think.

Q. What time would you report for work, Mr. Cox, in the day?—A. Around eight o'clock in the morning. Seven-thirty to eight.

Q. I beg your pardon.—A. Seven-thirty to eight, something like that.

Q. How long were you on duty?—A. Sometimes I was on duty up until five and six o'clock.

Q. You also worked during the Christmas rushes beginning in 1927, didn't you?—A. Yes, sir.

Q. How many days a year would you work during the rushes?—A. I worked about six days. Sometimes I was too sick to even sit up to hardly carry the mail but I had to carry it anyway.

Q. You didn't use the car in that work?—A. Yes, sir.

Q. Did you drive it yourself? (R. 103.)—A. Part of the time.

Q. Some of these parties drove your car on these occasions at times?—A. Yes, sir.

Q. How much were you paid, Mr. Cox, per day?—A. Well, I was paid anywhere from four dollars. Christmas rush I only got \$30 for carrying the mail.

Q. You also were given allowance for your car?—A. No, sir.

Q. They didn't give you anything for your car?—A. No.

Q. Are you sure of that?—A. Yes, sir. If they did they owe it to me. I never did get it.

Q. Your route was discontinued when they combined the post office in Arlington County with the Ballston Post Office in June, 1936?—A. Yes.

Q. Now, they have a city delivery, don't they?—A. Yes.

Q. And the route you carried on has been discontinued?—A. The rural route has been done away with entirely in Arlington County.

Q. Did you ever work in a store, Mr. Cox?—A. I have helped a little around, just a friendly help because I was raised in a store.

Q. Who have you worked for?—A. I used to do a few little things for Mr. Pfeifer because he couldn't get down. He was 13 miles away, he lived (R. 104) from the store.

Q. When did you start working for him?—A. I never worked for him.

Q. Did you start working in February 1930?—A. No, sir.

Q. To refresh your memory, didn't you start working in February 1930 for Mr. Pfeifer at his market on M Street?—A. I never received any money from Mr. Pfeifer for working for him.

Q. Did you receive any groceries?—A. Yes, sir, groceries and things like that.

Q. What did you do for him?—A. I used to go to the bank, take his money to the bank and things of that kind for him when he couldn't get out of the store, because I was a friend of his.

Q. How many days a week did you work for him?—A. I never worked for him.

Q. You were there Fridays and Saturdays?—A. Sometimes when I was able to, I was.

Q. What did you do besides going to the bank for Mr. Pfeifer?—A. I ran little errands for him.

Q. Did you ever wait on the trade?—A. Yes, sometimes. That was my trade before when I was a growing boy.

Q. Did you clean out the floors?—A. No, sir; I didn't.

Q. Did you help arrange his stock?—A. No, sir; I didn't (R. 105).

Q. What time would you come to work in the morning, Mr. Cox?—A. I never went to work early.

Q. What time?—A. I never worked for him.

Q. What time?—A. Well, around sometime eight o'clock I would get over; I stayed around there for him or whenever he called me up to go to the store and open it for him.

Q. You opened up for him around eight o'clock.—A. Sometimes.

Q. Fridays and Saturdays?—A. No, sir; his brother opened the store.

Q. Mr. Cox, you opened the store for him on Fridays and Saturdays and received five dollars for that service. Isn't that a fact? You took it out in trade; isn't that right?—A. No, sir.

Q. How long were you connected with Mr. Pfeiger?—A. I have known Mr. Pfeiger about 18 years.

Q. I mean in the store.—A. I wasn't in the store, I wasn't working.

Q. You had taken the money from the store to the bank?—A. Sure, I took the money there just through a friendly act.

Q. Did he give you anything?—A. Just whatever he seen fit to hand me for it.

Q. Did he give you five dollars for your week-end work on Friday and Saturday? (R. 106.)—A. No, sir.

Q. Didn't he pay you five dollars for the week-end work during February 1930 to July 1935?—A. Not as I know of.

Q. Didn't you get the equivalent in groceries?—A. It is news to me if I did.

Q. Didn't he sell you groceries at a discount?—A. No, sir; he didn't. If I wanted anything from Mr. Pfeiger I would get it from him. I didn't have to ask him for anything. He would give it to me if I wanted it.

Q. What did you do in return for it?—A. I would go to the bank and different things, and he would just give me stuff, anything that I could use.

Q. Would you go to the bank every week-end?—A. Every week.

Q. In return for going to the bank for him on Fridays and Saturdays during this period he gave you groceries?—A. He gave me groceries at different times.

Mr. DAWSON. I object. He has asked the same question a dozen times.

The COURT. The court doesn't think he has gone beyond the legitimate scope of the cross-examination. Proceed, gentlemen.

The WITNESS. I have never worked for anyone.

By Mr. SPELL:

Q. In other words, you worked at that store as what is known as an extra during the week-ends, didn't you?—A. No, sir.

Q. There is no question about that. You say you took (R. 107) the money from the store to the bank for Mr. Pfeifer on Friday and Saturday?—A. I didn't say on Friday and Saturday.

Q. When, Mr. Cox?—A. During the week whenever he called me up and asked me to come over and take it for him. It would be at different times.

Q. Did that take place continuously from February 1930 to July 3rd, 1935?—A. I have been a friend of Mr. Pfeifer.

Q. Answer my question, please.

The COURT. What is the question? Answer the question. If Mr. Spell doesn't think your answer responsive, he may move to strike it out. Proceed.

Mr. SPELL. Will the reporter please read the last question?

(The last question, as above recorded, was read by the reporter.)

The WITNESS. I would do anything that Mr. Pfeifer asked me. He called me up and asked me if I could take care and go out for him. He would ask me to come to the store and stay and watch the men around the place or watch after things for him.

By Mr. SPELL:

Q. These errands that you ran for Mr. Pfeifer, did they occur more often on Friday and Saturday?—A. No, sir; it

may have been Monday, Tuesday, or Wednesday, or any other time that he called me up to do anything. He called me up on one occasion and I went over there and took care (R. 108) of the place. I had to get some medicine for him——

Q. Between February 1930 and July 1935 did he made a regular practice of paying you in goods each week-end during that period of time?—A. I can't recollect anything like that.

Q. Each week-end he gave you some goods; is that right, during this period of time?—A. Not all the time, no, because I wasn't in there all the time around the place there.

Q. Mr. Cox, when did you start your paper and painting business?—A. I started painting about—papering and a few little things around about 1927 or 1928, as well as I can recollect because some of my friends asked me to supervise those things.

Q. What was your first job?—A. I couldn't tell you.

Q. How many jobs did you have in 1927?—A. I couldn't tell you.

Q. Well, your best estimate?—A. I couldn't say.

Q. Did you have as many as a dozen?—A. I don't know.

Q. Did you have as many as six?—A. It might have been, I couldn't say for sure.

Q. Do you know how much you made on those jobs in 1927?—A. Sometimes I didn't make anything from them.

Q. How many jobs did you have in 1928?—A. It was so few I never kept any record of anything.

Q. Did you do any advertising for business?—A. I put out a few cards (R. 109).

Q. Did you have a sign on your truck?—A. No, sir, I didn't.

Q. How many jobs did you have in 1929?—A. I couldn't say.

Q. Did you have as many as a dozen?—A. I couldn't say for sure.

Q. Two dozen?—A. I couldn't say.

Q. What is your best judgment?—A. I wouldn't like to say.

Q. But you do know that in 1929 you were holding yourself out as a paperhanger and painter?—A. I had to make a living somewhere. I tried to get a few days because there

wouldn't be anything for me except what my poor mother would do.

Q. How many jobs did you have in 1930?—A. I couldn't say. I never kept any record of anything like that.

Q. Are you now working on a painting and papering job, Mr. Cox?—A. No, sir.

Q. You don't have one going on now?—A. No, sir, I don't.

Q. When did you finish?—A. I had a man at my house painting.

Q. I mean, when is the last job you had for someone else?—A. I guess it has been about two or three weeks ago.

Q. Where was that, Mr. Cox?—A. I had a man do two rooms for another one over there (R. 110).

Q. Where was that?—A. In Arlington County.

Q. What is the address?—A. It was on Breenbrier Street.

Q. Who gave you that work?—A. From a man at the courthouse.

Q. What is his name?—A. Paine.

Q. How many men did you have working on that, Mr. Cox?—A. One.

Q. Did you work on it yourself?—A. No, sir, I didn't.

Q. You say it was two rooms to be papered?—A. It is two rooms and a little hallway between the two rooms.

Q. Did Mr. Paine engage you personally to do it?—A. Yes, sir.

Q. You did supervise the job?—A. I was there several times but had to go back home.

Q. He held you responsible for the job?—A. Yes, sir.

Q. How much did he pay you?—A. I got \$22 for it.

Q. You paid your own laborer?—A. Yes, sir.

Q. In 1930 how many jobs did you have?—A. I couldn't tell you.

Q. Did you have as many as two dozen?—A. I don't think so (R. 111).

The COURT. What year was that?

Mr. SPELL. 1930.

The WITNESS. I have never done any business to amount to anything that wouldn't justify a man to go out and tell

it because I only do just what my friends call me that I know me personally from the mail route or things like that.

Mr. SPELL. I object to that.

The COURT. I think it is all right.

By Mr. SPELL:

Q. Did you do a dozen and a half jobs in 1930, your best judgment?—A. I couldn't say for sure. I would say that I did.

Q. Mr. Cox, we are trying to get the facts. If you can't be absolutely certain you can give your best judgment?—A. I didn't do enough to keep the account or anything like that. In my condition I didn't try to figure anything because I can't see good enough.

Q. You would not deny that you did a dozen in 1930?—A. There may have been a dozen.

Q. Well, now, how much did you earn in 1930 for this work?—A. I never earned anything on some of them. I lost on some of them.

Q. Did you have a bank account during the year 1930?—A. I have always had a small bank account.

Q. Where did you have your bank account?—A. Falls Church.

Q. In what bank?—A. Falls Church Bank (R. 112).

Q. Falls Church Bank?—A. Yes, sir.

Q. Do you have just an account with one bank?—A. That is all. I don't have nothing to do with that. I have to put up 50 cents to \$100 capital to keep the amount there just to cash checks when I get one and pay 15 cents every time I get it cashed.

Mr. SPELL. Your Honor, that is not responsive.

The COURT. What are you trying to do? Are you trying to find out what he has?

Mr. SPELL. Yes.

The COURT. He is attempting to explain his financial situation and the Court thinks the answer is responsive. Just because the answer isn't a direct reply doesn't mean that it is not responsive. Proceed, gentlemen.

By Mr. SPELL:

Q. You don't recall how much you earned in 1930 from your paperhanging and painting business, do you?—A. No, sir; I don't.

Q. Well, do you recall how many jobs you had in 1931?—A. No, sir; I don't.

Q. Do you recall how much you earned from that work in 1931?—A. It wouldn't be worth at all what I did earn. I would be ashamed if I really knew.

Q. Did you ever do any papering for Mrs. Groves of 9340 Stewart Street, Arlington, Virginia?—A. I did once upon a time.

Q. When did you do that? (R. 113.)—A. I couldn't tell you. I didn't try to keep any dates.

Q. What is your best memory?—A. I couldn't say. I would like to say but I can't.

Q. How much did you earn from that?—A. I couldn't say that.

Q. Did you do that yourself?—A. No, sir.

Q. It was under your supervision?—A. Yes, sir.

Q. And the money was paid to you?—A. Yes, sir.

Q. And you paid the laborer?—A. Yes, sir.

Q. Mr. Cox, you also did some painting for Mr. Nathan Scanlon, didn't you?—A. I had it done.

Q. When was that?—A. That has been so long I couldn't tell you. I can't remember dates.

Q. Give us an opinion, your best opinion.—A. It was before his wife died, and that is all I can tell you.

Q. When did she die?—A. I couldn't tell you.

Q. How much did you get for it?—A. I couldn't tell you that.

Q. How much work was it?—A. It wasn't to amount to anything; maybe a kitchen, a kitchen ceiling, or something like that (R. 114).

Q. You don't know whether it was one, two, or three rooms, do you?—A. I never remember painting—it was but one kitchen ceiling.

Q. But you don't remember how much you were paid?—

A. No, sir.

Q. You don't remember what work you did?—A. No.

Q. But you do know it was one ceiling, one kitchen ceiling?—A. I couldn't say when it was or anything like that.

Q. Did you ever do any work for Mr. Charles Mason, contractor, of Arlington, Virginia?—A. Yes, sir.

Q. How many years does that cover?—A. Probably three years.

Q. How many houses a year do you do for him?—A. I couldn't tell you that.

Q. Have you done four or five houses a year?—A. Maybe four or five; something like that.

Q. Six or seven?—A. Maybe, I couldn't tell you because I never keep a record of it.

Q. You think it is as many as ten?—A. I may have done ten for him.

Q. I mean each year.—A. No, sir.

Q. For the past three years?—A. About three years I may have done ten for him (R. 115).

Q. How many did you do this last year for him?—A. I couldn't say for sure—about four—three or four. I couldn't say for sure.

Q. How many have you done yourself this present year 1940?—A. The best of my knowledge has been about three.

Q. Three this year?—A. Yes, sir. * * * (R. 116.)

* * * * *

Q. Mr. Cox, when we adjourned last evening, we were talking about your work with Mr. Charles Mason. You heard Mr. Mason (R. 142) testify?—A. Yes.

Q. You performed the work that he testified to, didn't you?—A. Yes, sir.

Q. Mr. Cox, did you ever do any work for Mr. Ernest Lansford?—A. Yes, sir.

Q. What work did you do for him?—A. On one house.

Q. Where was that house located?—A. On Key Boulevard.

Q. What sized house was it?—A. Six room and bath.

Q. You did the papering and painting?—A. No painting—nothing but painting in there.

Q. When was that, Mr. Cox?—A. That was in the last three weeks, the past three weeks.

Q. How much did you receive for it?—A. I was supposed to get \$300 for the job.

Q. How many men did you have working on it?—A. Sometimes three, sometimes two, sometimes one.

Q. Did you ever do any paperhanging for Mr. Pickett?—A. I did two rooms for him.

Q. When did you do that?—A. That has been done about three years ago as well as I can recollect.

Q. You are sure it wasn't three upstairs rooms?—A. It might have been three (R. 143).

Q. How much were you paid for it?—A. I really couldn't tell you to save my life. I don't keep any record of anything like that because when they are done with I have no room to keep up.

Q. Was that as much as \$100?—A. No, sir; I know it wasn't \$100.

Q. What is your best judgment?—A. Around—the average room runs not over \$12 a room.

Q. About \$36?—A. Well, say, thirty-five. I don't know just exactly what it was. I couldn't say.

Q. During the year 1938 didn't you and the helper install two closets in the Pickett home?—A. Mr. Shields done the work for him.

Q. Did you help him?—A. No, sir.

Q. What did that consist of, Mr. Cox?—A. Two little closets in the bedroom.

Q. Did you put any shelves and fixtures and painting in them?—A. No, sir; I didn't do nothing but a little Texolite on the inside.

Q. Did you get this contract yourself?—A. Mrs. Pickett came over to the house after me.

Q. She held you responsible for the work?—A. Yes, sir.

Q. How much did she pay you?—A. I don't know whether it was one or two dollars.

Q. Did you ever do any construction work for a carpenter (R. 144) by the name of Smith in Arlington County?—A. No, sir.

Q. Did you ever do any papering for Mr. Herbert W. Poole?—A. Mr. Shields did two rooms—three rooms for him.

Q. Mr. Cox, Mr. Shields was your employee?—A. Yes, sir.

Q. How much were you paid for that?—A. It wasn't—I wasn't paid anything. We swapped work on that.

Q. Did you do some laboring work for Mr. Poole?—A. Mr. Shields did the work for Mr. Poole. Mr. Shields was with me at the time.

Q. How much did you pay Mr. Shields to do the work for you?—A. Mr. Shields?

Q. Yes.—A. He got five dollars a day in what he done.

Q. You paid him?—A. Yes; he got his money.

Q. About 1938 did you ever do any work for Mr. Willet?—A. 1938? Yes, sir.

Q. What work was that, Mr. Cox?—A. It was in Clarendon, Virginia.

Q. Did that consist of two rooms?—A. Not in 1938; no, sir.

Q. How many men did you have on that job?—A. It was two part of the time and part of the time three. Sometimes one. When the paperhanger was there it was one.

Q. Did you receive the contract yourself? (R. 145.)—A. Yes, sir.

Q. You were responsible for the work?—A. Yes, sir.

Q. How much were you paid for it?—A. I haven't got any money for it.

Q. How much were you to get?—A. One hundred and thirty odd dollars I believe it was. I am not sure.

Q. About 1938 weren't you given a contract by Mr. Willet to paint two storerooms located at 3016 and 3018 Wilson Boulevard in Arlington?—A. No, sir.

Q. You were not?—A. No, sir,

Q. What other work did you do for Mr. Willet?—A. I had done two stores for him.

Q. Not at this address?—A. Yes; at that address.

Q. I understand you to say that you didn't do it.—A. I said not in 1938.

Q. But I say when did you do it, Mr. Cox?—A. It was done this year.

Q. How much did you get for that?—A. Mr. Willet—it was done time and material—ten percent on the dollar. Mr. Willet paid the men. I just took the men there.

Q. You drove them personally to the job?—A. Yes; they came on the job.

Q. Did you purchase and deliver the paint personally? (R. 146.)—A. It was sent around from the paint store right around the corner.

Q. How many men did you have working on the job?—A. Sometimes one and sometimes two.

Q. You personally purchased a great deal of this paint that you use, don't you?—A. Yes, sir.

Q. Who do you usually purchase it from?—A. The only one—most of the paint was from Mr. Kaplan.

Q. You personally purchase most of the wallpaper and paperhanging material?—A. Yes, sir.

Q. Where did you get most of that?—A. Most of it comes from Mr. Kaplan. Mr. Kaplan always favors me on the paper, trimmings, and everything. He doesn't charge me anything for trimming it.

Q. How much do you pay out each year for paint?—A. It wasn't very much.

Q. Well, give us your best judgment.—A. I wouldn't like to say because I really don't know.

Q. You wouldn't give us any estimate?—A. It might run \$50 some years, some years it may run one hundred.

Q. Well, how much do you usually pay for paper a year?—A. I wouldn't like to say on that because I don't do very much work.

Q. Can you say how much you spend a year for paper?—A. No, sir, I wouldn't say.

Q. How much do you spend a year, Mr. Cox? (R. 147.)—A. I would say maybe sometimes \$75, \$80, maybe one hundred I have never done much work. Just what friends call up and give it to me because I guess they feel sorry for me in the condition I am in.

Q. Did you ever do any work for Mr. Ernest Lunsford?—A. Yes, sir.

Q. He is a contractor in Arlington, isn't he?—A. Yes, sir.

Q. When did you first start working for Mr. Lunsford?—

A. This year. I done one house for him.

Q. How much did you receive for that?—A. I told you. Three hundred dollars.

Q. How many men did you have on that job?—A. Sometimes two, sometimes one, sometimes three.

Q. When did you complete that last job for Mr. Lunsford?—A. I would say about three weeks ago or two or three weeks.

Q. Was the house located on Lee Boulevard?—A. Yes, sir; Lee and Edgewood Street in Arlington.

Q. Did you supervise that job?—A. Yes, sir.

Q. You were held responsible for the work?—A. Yes, sir.

Q. I ask you to think really carefully, Mr. Cox, and state if you can, whether you did any other job for Mr. Lunsford.—

A. No, sir; I haven't. I have loaned him my men, some of my men to take out there on the job.

Q. How many men do you have? (R. 148.)—A. Whenever I need a man I just go down to the street and pick him up, friends of the paint store. If I don't have a regular man I just whenever I need a man I go down and pick him up.

Q. You usually have quite a supply rooming in your home?—A. Yes, but they don't work for me.

Q. Some of them do, don't they?—A. Once in a while.

Q. I ask you if Mr. Lunsford isn't now trying to get you a job of painting a new restaurant now under construction?—A. I have a few windows to do there in the restaurant. The other work is to be done by inexperienced men.

Q. How much did you receive from that?—A. I got a percentage on that.

Q. I ask you if you won't get approximately \$200 if you get the job?—A. No, sir; there is not \$50 worth of work there, painting and everything.

Q. Well, who else did you work for? What other contractor?—A. I done a little work for a Mr. Grigsby.

Q. Well, when did you first start working for Mr. Grigsby?—A. Along the time I started with Mr. Mason.

Q. About what year was that?—A. About three or three and a half years ago.

Q. Well, now, how many houses have you done for Mr. Grigsby?—A. Several (R. 149).

Q. Seven?—A. Several houses.

Q. Could you give us an estimate of whether it was five, six, or seven?—A. Two or three. I don't know just exactly how many. I never kept count of them.

Q. About how many do you do a year for him?—A. I don't do anything for him.

Q. I mean how many houses do you do a year for him?—A. I have done several houses for him during that time.

Q. Where was the last job you did for him?—A. On Irving Street.

Q. What did that consist of?—A. Painting, the whole thing was painting.

Q. How much was the house?—A. Four—five rooms, and kitchen.

Q. Did you paint it inside and out?—A. Yes, sir.

Q. About when did you do that work?—A. That was done last fall.

Q. How much did you receive for it?—A. Around \$275. That went into court.

Q. How many men did you have working on that job?—A. Sometimes one, sometimes two. There was no money made on it.

Q. You averaged two or three hundred dollars for each of the houses you did for Mr. Grigsby?—A. No, sir.

Q. How much did you average? (R. 150.)—A. The ones that I have been running about \$200.

Q. Did you ever do any paperhanging and painting for Mrs. Dorothy Stuart?—A. Yes, sir.

Q. When did you do that?—A. Last summer.

Q. How large was the house you did work on?—A. Six rooms and kitchen.

Q. Where was it located?—A. No; five rooms and kitchen.

Q. Where was it located?—A. Washington Boulevard and Buchanan Street.

Q. How many men did you have on that job?—A. One sometimes and two to scrape the paper off.

Q. How much were you paid for it?—A. Mr. Shields did most of the work in there.

Q. How much were you paid by Mrs. Stuart for the work?—A. I can't remember just exactly the amount.

Q. Was it \$250?—A. I couldn't say for sure just what it was.

Q. How long did you work?—A. What?

Q. How long did it take you to do the job?—A. I never kept any account of it. Mr. Shields did the work and he boarded at my home.

Q. You supervised the work?—A. Some of it. You don't have to bother him when he was on the job.

Q. She held you responsible for it, didn't she? (R. 151.)—A. Yes, sir.

Q. And she paid the money to you?—A. Yes, sir.

Q. And you paid Mr. Shields and the other laborers, didn't you?—A. Yes, sir.

Q. I ask you if you didn't do the following three jobs for the McLaine Realty Agency of Arlington, Virginia: one house located at 1205 North Illinois Street, Arlington, Virginia, one 201 North Illinois Street, Arlington, Virginia, and one house on North Hamilton Street, Arlington, Virginia?—A. Yes, sir.

Q. How much did you receive for those three houses?—A. Six hundred and a few dollars. I don't know just exactly.

Q. \$640, wasn't it?—A. It might have been, I won't say for sure because I don't know just exactly how much. I know it was a little over six hundred.

Q. On these houses you helped to do some of the paper-hanging yourself, didn't you?—A. No, sir; I didn't.

Q. How many men did you have working on these jobs?—A. I had two. Two men painting and Mr. Barney hung the paper.

Q. Did you supervise the work?—A. Yes, sir.

Q. And the money was paid over to you?—A. Yes, sir (R. 152).

Q. And you paid your help?—A. Yes, sir; and there was a Mr. White. He supervised part of it when he stayed sober.

Q. I will ask you because of the good job that you did on those three houses if you weren't given the contract by the McLaine Company to paper and paint a large apartment house just off Wilson Boulevard near North Uhle Street?—

A. Sixteenth Street.

By the COURT:

Q. When was that?—A. Last year.

By Mr. SPELL:

Q. How much was that contract for, Mr. Cox?—A. The contract was supposed to call for \$1,700.

By the COURT:

Q. What do you mean was supposed to call for?—A. Well, he changed it. He put in cabinets and he deducted so much for the cabinets and that took it down to \$1,400.

By Mr. SPELL:

Q. Isn't it a fact, Mr. Cox, that when you got in the middle of the contract you couldn't supply the paint and that from then on Mr. McLaine purchased the paint and wallpaper himself?—A. No, sir; it is not true.

Q. How much money did he actually pay over to you in cash?—A. I couldn't say exactly. About five hundred and some odd dollars.

Q. I ask you to think very hard and state whether or not he didn't pay you \$883.53 on this contract? (R. 153.)—A. He didn't. He couldn't pay me \$833 and some odd cents when the contract for \$1,400 and the paint ran for \$700.

Q. I ask you if the balance of the contract, if he didn't pay for the paint himself, that is the reason he didn't pay you the full amount.—A. No, sir. You ask him for the papers and see what it is. I told him I didn't want the money to purchase the paint.

Q. What is the profit on that job?—A. I lost money on it to my sorrow.

Q. I ask you if he didn't make a first payment on this contract on October 21, 1939.—A. I couldn't tell you that.

Q. I will ask you if he didn't make a last payment on this contract on January 2nd, 1940.—A. I know it was around the first of the year. I couldn't just say what day.

Q. How many men did you have on that job, on the apartment house job?—A. Sometimes seven, sometimes eight, sometimes two, sometimes one.

Q. You name as near you can the men working with you on that job.—A. Some of them I don't know the name now.

Q. Do you recall a Mr. Joe Lewis?—A. Yes, sir.

Q. Do you recall a Mr. Marion?—A. Yes, sir.

Q. Do you recall a Mr. Arthur Stokes?—A. He worked one week (R. 154).

Q. Can you give me the names of some of the other employees on that job?—A. I don't know whether I could now or not. I just picked up these men and took them out to work and things like that. Then I left them there and when they got through with the job I am through with them.

Q. Mr. Cox, you supervised this work, didn't you?—A. Yes, sir.

Q. And the McLaine Realty Company held you responsible for the work?—A. Yes, sir.

Q. And paid you money under the contract, didn't they?—A. They did.

Q. Mr. Cox, how long have you been in the paperhanging business?—A. I told you I have been doing this work for several years. I don't know just exactly how long—something about 1928, I had a little job on.

Q. Mr. Cox, can you state some of the jobs you have done that I haven't questioned you about?—A. You have most of them.

Q. Can you mention a few that I haven't?—A. I don't know as I could.

Q. When did you first go in the papering and painting business?—A. I told you somewhere around either 1927 or 1928—1928, I think it was that I did a few little jobs.

Q. Have you been engaged continuously in the paperhanging and painting business since 1928, to the present? (R. 155.)—A. No, sir; I haven't.

Q. What years didn't you engage in it?—A. Just a few little jobs, odd jobs that came in that somebody else didn't want, I did.

Q. In what year didn't you engage in the paperhanging business?—A. I have done a little all along.

Q. Mr. Cox, you have owned a truck since 1926, and engaged in the hauling business, and have been in the paperhanging business since 1928? Do you have any records?—A. I told you I never keep any records of anything because I have no license to haul.

Q. Do you have any record of the jobs you did?—A. No, sir.

Q. None whatsoever?—A. No, sir.

Q. Since you have engaged in this business have you filed any income tax?—A. I never made enough.

Q. Have you kept any records?—A. No, sir.

Q. I think your income tax could be examined.—A. I never got enough to pay an income tax. I have never done as much as \$500 a year. I never made \$200. I never made as much as \$250.

By the COURT:

Q. In any year?—A. No.

Q. Out of any of this business? (R. 156.)—A. No, sir; I haven't. I simply try to get along and I have such a time to get a few odd dollars together that I just take a little job or two and do the best and try to make a living in a decent way.

By Mr. SPELL:

Q. Mr. Cox, back to your driving an automobile. I believe you said you averaged driving 5,000 miles a year?—A. It might be a little over, maybe less.

Q. How much more?—A. Well, I couldn't say. I never kept any record of anything like that.

Q. You never kept any record?

The COURT. That cross-examination was gone into fully yesterday.

Mr. SPELL. Yes; your Honor. One more question, please.

By Mr. SPELL:

Q. What other trip did you take other than the one to Miami?—A. That is the only one.

The COURT. You may ask him another one if you wish.

By Mr. SPELL:

Q. I believe you said that you were driving a mail route of 35 miles?—A. It was the last few months before the closing of the post office.

Q. You have never had an accident driving an automobile, have you?—A. No, sir.

Mr. SPELL. That is all (R. 157).

By the COURT:

Q. Now, Mr. Cox, as I understand your testimony, this painting and paperhanging work didn't begin until some time in 1928; is that correct?—A. Yes, sir.

Q. Now, the boarding, when did that begin?—A. The boarders have been around just off and on since about 1928.

Q. Now, in the spring and summer of 1927, were there any boarders there?—A. No, sir.

Q. Were there any boarders at your place wherever you lived?—A. Yes, sir.

Q. You were keeping boarders with you?—A. No, sir; I was boarding myself.

Q. You were boarding yourself?—A. Yes, sir.

Q. How long has this Miss Clem been at your place?—A. About ten years.

Q. What has been the financial arrangement about the boarders between you and Miss Clem?—A. She has to take whatever she can get out of those who come here.

Q. How are you compensated for it?—A. Well, I get my board.

Q. And that is all?—A. Yes, sir.

Mr. SPELL. May I ask another question, please? (R. 158.)

The COURT. Certainly.

By Mr. SPELL:

Q. You say that your income wasn't more than \$250 a year.
The COURT. He said a hundred and fifty a year.

The WITNESS. Yes, sir.

By Mr. SPELL:

Q. You didn't include in that your compensation?—A. No; I have nothing to say about that.

Mr. SPELL. I would like to offer in evidence Government document marked Exhibits 1 to 4, inclusive.

The COURT. Now, are you beginning your case?

Mr. SPELL. No; but this is rebuttal. This evidence is rebuttal of this witness.

The COURT. The Court says it is admissible but just where you are placing it is a different proposition. Whether you want to offer it now or later is a matter which you have to decide. The Court wants to call your attention to the fact. You may be putting it in the wrong case.

Mr. SPELL. Well, in that event I will withdraw it.

The COURT. All right.

Further direct examination by Mr. DAWSON:

Q. Mr. Cox, you heard this testimony about some work done in his place there?—A. Yes, sir.

Q. Was there any record kept or account kept about the expenditure on that job?—A. Yes, sir (R. 159).

Q. Do you know where those books and records were?—A. I went to Mr. Smith and got them last night.

Q. Do you have the books and records with you now?—A. Yes, sir.

Q. And in whose handwriting are those books and records?—A. My own.

Q. And did you make all the entries there?—A. Yes, sir; I did.

Q. Did you keep it yourself or did you deliver it to somebody?—A. I kept it myself.

Q. Where did you get it last night?—A. From Mr. Smith.

Q. Will you refer to that and tell the court and jury just what expenditures there were on that job as far as the painting and men and so forth?

By the COURT:

Q. Mr. Cox, as I remember, I am just trying to figure out another angle. You had two jobs painting?—A. Yes.

Q. Each around \$500?—A. No; one was five hundred and something odd dollars, I believe it was, I couldn't say for sure.

Q. I was under the impression that he gave you two jobs for \$500. Proceed, gentlemen.

The WITNESS. I borrowed part on my own and part on another to defray some expenses that I have.

By Mr. DAWSON:

Q. Will you refer to those books and accounts in your (R. 160) own handwriting and tell the Court and jury what the paint cost you?

Mr. SPELL. Are you offering those in evidence, counsel?

Mr. DAWSON. Well, I can, if you want to.

Mr. SPELL. I object, unless they are put in evidence.

Mr. DAWSON. Well, they are in his handwriting.

Mr. SPELL. He may refresh his memory, but if he is going to read from them, I would like to have them in evidence.

The COURT. He may use them to refresh his recollection.

Mr. DAWSON. I have no desire to introduce these.

The WITNESS. Mr. Smith asked me because the job was on a percentage basis, and he asked me to keep a correct account of the work. There is his book. He asked me so that I would have it on the income tax to give it to him so that he wouldn't be mistaken as to what he paid out. Here is the book.

Mr. SPELL. I object to that. It is hearsay.

The COURT. Who is Mr. Smith?

Mr. DAWSON. Mr. Smith is the mail carrier.

The COURT. That is what I thought.

Mr. DAWSON. Mr. Smith is retired now.

The COURT. I know.

Mr. DAWSON. And Mr. Cox did some work down in his place there.

The WITNESS. The new place that he bought.

The COURT. Your objection is to what, Mr. Spell?

Mr. SPELL. If he is going to read from the record I ask that they put it in evidence.

The COURT. If he is in a position to testify to that, he is the one using the documents and if after refreshing his recollection (R. 161) he can testify satisfactorily under oath, he has a right to do it.

Mr. SPELL. Yes; your Honor.

By Mr. DAWSON:

Q. Mr. Cox, please refresh your memory from these books.

The COURT. If he can.

By Mr. DAWSON:

Q. Please tell the jury how much you paid for your paint other than the work? What was the cost of the job?—A. The paint for Mrs. Smith's job, he said yesterday, that he paid out around \$515, I believe is what he said yesterday, he said. Well, the paint bill ran around 230 or 235, somewhere along there, and the labor ran around \$550.

Q. What was your percentage on that?—A. Maybe a little more or less, I couldn't say. My percentage was on the 10 percent. I had to furnish also the truck or the car to take the men to the work.

Q. Who paid for the gasoline?—A. I paid for the gasoline and took the men back and forth to the work.

Q. How much did you get out of the job? I mean gross.—A. Around 70 or more odd dollars, something like that.

Q. That is your gross?—A. As near as I can remember now.

Q. Is that less your yearly use for gas for the truck?—A. Yes; part of the time I had to give something to somebody to take the man up there to the work. There was 21 miles to travel, the days that I couldn't go myself.

Q. Now, Mr. Cox, how much money did you earn when you (R. 162) worked for Mr. Grigsby?—A. Well, I haven't earned enough.

Q. I just want to know what did you earn.—A. I couldn't say, Mr. Dawson, for the simple reason that I lost on those jobs and haven't any record.

Q. Would you say you earned any money from his work or not?—A. I earned a little but I had to turn it over to collect more money that was coming.

Q. How much was it?—A. They charged me 20 percent to collect the money, which was \$285 on the job and I received out of that to pay my help and everything \$200.

By the COURT:

Q. Is it your testimony that you actually lost on the Grigsby job?—A. What?

Q. That when you got through with the Grigsby job you actually lost money?—A. Yes, sir.

By Mr. DAWSON:

Q. Now, just tell the Court and jury how much money you earned from the job that you did for Mr. Mason.—A. Well, the job sometimes on a house, and if anything goes wrong on the job, like I did on Edwards Street, the one that Mr. Mason testified this morning, the rooms turned out to be a case of hot plaster in the room and I had to go along and do the room over which has been three times with Texolite. It burned through and showed light grease spots in it, and when I (R. 163) got through with that I didn't have a nickel on that job. That is just about the way this kind of thing turns out on you. You think you are going to make something and when you find you haven't done anything.

Q. You tell the Court and jury how much you made from the job that you worked for Mr. Lunsford.—A. Mr. Lunsford?

Q. Yes.—A. Well, I am ashamed to say because I couldn't stay on the job all the time myself, and I would get a telephone message that my men were down on the job drunk. They even drank the alcohol that you take over to do the floors with, and I haven't made a nickel off that job because I have gone in the hole.

Q. Tell the Court and jury how much money you made on the job with the McLean Realty Company.—A. I haven't made anything off those because I told you Mr. McLean is one of the hardest men I have met in my life. He wants you to buy the paint; he will give you a contract to go and get

your paint and he will specify the paint and when you bring it on the job, he will fix it so that he will have to sign for it himself on the job and if he is not satisfied and you don't pay three or four dollars a gallon for it, he will not sign it.

Q. Did you make any money while you were working for the McLean Realty Company?—A. There was no money to be made by my work for Mr. McLean.

Q. Did you make any money? (R. 164.)—A. No, sir; I didn't.

Q. Now, I want you to tell the Court and jury why you have attempted to do this work.—A. Because I wasn't able to get out and get a position anywhere else.

Mr. SPELL. I object to that, Your Honor.

The COURT. No; the Court thinks that is admissible.

Mr. SPELL. Whether he is able or not is a medical question.

The COURT. No; I don't think so. I think he can testify himself as to his own condition. The Court hasn't the slightest doubt.

The WITNESS. You all know that a person that has tuberculosis cannot keep a job in a restaurant because of the food, if you have tuberculosis you cannot get a job.

Mr. DAWSON. Just a minute. In that connection, may I ask a question?

By Mr. DAWSON:

Q. What was your prewar occupation?—A. My prewar occupation was grocery salesman in the bakery business.

Q. Do you mean that you were a baker?—A. I was a baker when I was 17—started in the bakery business when I was 17 years old. I served my time in the bakery business.

Q. Did you finally—A. I followed the bakery business for about nine years (R. 165).

By Mr. DAWSON:

Q. Mr. Cox, how long have your feet and legs been swelling?—A. They have been swelling on me—

Mr. SPELL. I object, your Honor. This has all been covered by direct examination, I think, and I don't see what purpose it may serve here.

The COURT. I don't think anything has been said before about swelling on his feet and legs. I don't remember anything. It is part of the direct examination, but it is in the Court's discretion whether the Court allows it.

Mr. DAWSON. Your Honor, I ask your permission to ask that question, and it should probably have been asked on direct. I admit that is properly direct.

The COURT. I think it is a proper question, and the Court in its discretion allows it at this time.

The WITNESS. Practically ever since I was discharged from the Army.

By Mr. DAWSON:

Q. Has that continued?—A. Yes, sir.

Q. From that time down to the present time?—A. Yes, sir; and I have never had the proper money to go out and get treatment on the outside like I should have had.

Q. Have you made an effort, Mr. Cox, from time to time to secure employment?—A. Yes; I have.

Q. Have you been able to secure employment?—A. No, sir. I used to work before I was (R. 166)—

Q. Has any physician ever advised you to *do* some little work to keep your mind off your disabilities?—A. They have advised me, the outside doctors, not the Veterans' Bureau doctors, but the outside doctors had advised me not to turn my hand to anything, except in 1919 Dr. Heffner told me that I couldn't live a year and not to turn my hand to anything; to go home and stay there.

Mr. SPELL. I object to what the doctor told him, if your Honor please, as purely hearsay.

The COURT. The Court overrules the objection. The Court thinks that the mental attitude of the plaintiff would in all human probability be affected by the doctor's advice, doctor's statement; and that not only would his mentality but his physical being be affected by it; and that it is admissible in evidence as part of the history of the condition which the plaintiff claims led up to what he says was total and permanent disability, what he claims was total and permanent disability on or about June 1, 1927.

By Mr. DAWSON:

Q. Was there anything further, Mr. Cox, you wanted to add to that?—A. Well, that's why I have no home today, is because I was disabled in service and was kicked out of home.

Mr. DAWSON. I think that is all, your Honor. I should like to know if Mr. Pfeiger is here.

A DEPUTY MARSHAL. He is.

Mr. DAWSON. I shall call him, then.

Mr. SPELL. I should like to ask two or three questions (R. 167).

Re-cross-examination by Mr. SPELL:

Q. Mr. Cox, you said you didn't have sufficient money to take treatment? You indicated that you would like to take treatment if you had the money, didn't you?—A. Yes, sir.

Q. Can't you get treatment from the Veterans' Administration?—A. I have been to the Veterans' Administration for treatments, and I was turned away. I even called the Veterans' Administration—my dear old mother called, and I was down and couldn't get a doctor any place, and they turned me down.

Q. When was that, Mr. Cox?—A. That was several years ago.

Q. When?—A. I couldn't say just exactly the time because I have had so many spells, I couldn't tell you.

Q. The Veterans' Administration refused to give you treatment; is that what you contend?—A. Well, I have been in the Veterans' Bureau, and how much have they ever treated me? I stayed in Mr. Alto, I stayed in Walter Reed, I stayed in the Nature Hospital, I stayed in—the only treatment I ever got from any place was in Providence Hospital.

Q. Mr. Cox, you are speaking about dates long past, aren't you?—A. Yes, sir.

Q. When was the last hospitalization you had of any kind? (R. 168.)—A. I was in Mt. Alto in '25.

Q. Yes, sir. And you haven't had any hospitalization, either private or government, since then, have you?—A. I detest hospitals, and I don't get any more treatment than I got in that place or any other—

Q. You don't want treatment, do you?—A. Yes, sir. I have asked them to do for me.

Q. But you will not go in a hospital, will you?—A. All they do to you in the veterans hospital——

Mr. SPELL. That calls for a yes or no answer.

The COURT. Let him finish answering the question, Mr. Spell. Finish answering the question, Mr. Cox. What did you say? You started to say, "All they do——"

The WITNESS. All they do in the veterans hospital, they take you in those veterans hospital, if you don't complain—well, I'm no person to complain for anything. If you don't complain you do not get any treatment; come around and take your temperature and maybe give you a little pill, ask you a few little questions, something like that: that's all you get.

By Mr. SPELL:

Q. Mr. Cox, you haven't been examined by the Veterans' Administration doctors since 1936, have you?—A. No, sir.

Q. Yes. You can get examination from them if you want it, can't you?—A. Well, what is the use of going there when they don't do anything for you? I went to them about my eyes several years ago, and what have they done? Nothing. And I can hardly read now. Most of the time I have to get a magnifying glass to read (R. 169) a newspaper if I want to read it.

Q. The book you hold in your hand, Mr. Cox, what does it contain?—A. This book is the stuff of Mr. Smith's.

Q. Yes.—A. The painting, and what his bills were.

Q. Do you have any other data of other jobs there?—A. No, sir.

Q. Yes.—A. This all was prepared for Mr. Smith alone.

Q. Do you have any books with data on other jobs at your home?—A. No, sir; I have not.

Q. Yes. Just this single job?—A. Yes, sir.

Mr. SPELL. That will be all.

The COURT. The court will take a recess for five minutes.

(Thereupon there was a brief informal recess, at the conclusion of which the proceedings were resumed as follows:)

. (The plaintiff resumed the witness stand.)

Mr. DAWSON. Your honor, I have just one more question, if you please.

Redirect examination by Mr. DAWSON:

Q. Mr. Cox, you testified in cross-examination that you had hospitalization at Providence Hospital, Walter Reed Hospital, and Mt. Alto, at the Dispensary for the United States Veterans' Administration in the District here? (R. 170.)—A. Yes, sir.

Q. I mean treatment at the United States Veterans'.—A. Yes, sir.

Q. Now, after you took their treatments have you gotten any better?—A. No, sir.

Mr. DAWSON. That is all.

Mr. SPELL. No questions.

The COURT. Step down.

(Thereupon the witness left the stand.)

Mr. DAWSON. I shall call Dr. Guynn, please.

Thereupon (R. 171).

JOHN M. HARRIS was called as a witness for and on behalf of the plaintiff and, having been first duly sworn, was examined and testified as follows:

Direct examination by Mr. DAWSON:

Q. Where do you live?—A. 4523 Wilson Boulevard, Arlington.

Q. How long have you lived there?—A. Since July.

Q. What is your business or occupation?—A. Painter.

Q. Do you know Mr. Cox, the plaintiff in this case?—A. Yes, sir.

Q. How long have you known him?—A. Well, I met him the latter part of 1928.

Q. How did you happen to meet him?—A. I was on a job he was working on. He was there and had another fellow doing some papering.

Q. You saw Mr. Cox at that time yourself?—A. That is the first time I had seen him.

Q. What was he doing at that time?—A. He wasn't doing nothing. He had a fellow there putting on some paper and I was doing the painting.

Q. Where was the job?—A. Over in Lyon Park (R. 79).

Q. Virginia?—A. Yes.

Q. How often have you seen Mr. Cox from 1928 down to the present time?—A. Well, I saw him quite often. We got to be right good friends. My wife and myself go to his place quite often.

Q. Did you ever live with him?—A. Yes, sir; I lived there one winter in 1935.

Q. During this period of time from 1928 down to 1935, have you had occasion to observe his physical condition during that time?—A. Well, I seen him in 1939. I had to drive him home where he passed right out.

Q. In 1928, what, if anything, did you notice about his physical condition?—A. Well, the first time I ever noticed was on the job where I was painting, and he passed out, sitting down on the floor. He just said his heart gave him a lot of trouble and went on to sleep and he came to in a little while and stayed there quite a while before he got up.

By the COURT:

Q. When was that?—A. 1928. That is when I first met him. I didn't know nothing about him then and I asked him what was wrong and he told me.

By Mr. DAWSON:

Q. Now, how often did you say you saw him in 1928?—A. I never saw him more than two or three times. This was almost 1929 when I saw him. It was the latter part of 1928 (R. 80) when I met him on that first job.

Q. Did you see him frequently during the year 1929?—A. Yes, sir.

Q. Just tell the Court and jury in your own language what you observed about his physical condition.—A. Well, what I—after I got to know him and found out about him, well, the way I figured, he wasn't in shape to do any kind of work.

Mr. SPELL. I object and ask that that be stricken. It is an opinion that he can't tell about.

The COURT. I will overrule the objection.

By Mr. DAWSON:

Q. Now, did you see him in 1930?—A. Yes, sir, I saw him ever since then up until now.

Q. How often did you see him, Mr. Harris?—A. Well, I never seen him—never was at his place until about 1934, and my wife and myself got to going there quite often, and we lived with him in 1935, that is, in the winter—my baby was born.

Q. What can you tell the Court and jury about his physical condition in 1934 and 1935?—A. Well, it seemed to be getting worse all the time. Down in his own house he passed right out and would go on to sleep and said his heart was giving him trouble.

By the COURT:

Q. When you say "going to sleep" do you mean normal sleep?—A. Like a faint. Just passed right out all of a sudden.

By Mr. DAWSON (R. 81):

Q. How often did that happen?—A. I have seen it quite frequently.

Q. And particularly during the winter?—A. Yes, sir; well, I seen him last winter, last December. Twice in one month I had to drive his car home for him.

Q. Mr. Harris, have you ever been an employer of men on jobs?—A. Yes, sir.

Q. How much experience have you had with that?—A. About six or seven years.

Q. Have you hired and fired a lot of men in your time?—A. Yes, sir.

Q. From what you observed of Mr. Cox's physical condition for this period of time, would you consider him a man capable of doing work as a paperhanger?—A. No, sir.

Mr. SPELL. I object.

The COURT. I will overrule the objection. Of course, what the counsel for the defendant has in mind is the fact that the capacity to work of the plaintiff is elementary and a question of fact for the jury.

Mr. SPELL. Yes, your Honor.

The COURT. Now, that objection is sound but each individual has his own manner of speaking. This witness is doing the best he can in his manner of speaking and describing the condition of the witness and it is inevitable that he should seem to express an opinion as to the man's condition and the Court doesn't think that any ruling of evidence is being violated. As far as the last question is concerned it shows (R. 82) that this man is a laboring man and has been a laboring man all his life. He knows this man intimately according to his testimony and the Court thinks that he is capable of saying, after the experience he has had with the plaintiff, which he is testifying to, whether or not the man is fit for work. The Court hasn't any doubt about that.

Mr. DAWSON. That is all.

Cross-examination by Mr. SPELL:

Q. You say that you lived with Mr. Cox during the winter of 1935?—A. Yes, sir.

Q. How much room rent did you pay?—A. I paid board.

Q. How much?—A. Fifteen dollars.

Q. A week?—A. Yes, sir. My wife, myself and the kid.

Q. Fifteen dollars a week?—A. Yes, sir.

Q. Did you know that Mr. Cox was and during that time supervising painting jobs and papering jobs?—A. At that time he wasn't doing much. Occasionally he got a job; yes.

Q. Did you ever work with Mr. Cox?—A. Yes, sir.

Q. How many jobs did you work with him?—A. I worked on four or five with Charlie Mason.

Q. Did Mr. Cox employ anyone else to work with you? (R. 83.)—A. Yes,; sometimes a couple of fellows.

Q. Did he supervise the work?—A. Yes, sir.

Q. He was paid money for the job and he paid you?—A. Yes, sir. The way he took it, he got ten percent on the work and we do the work.

Q. When is the last time you worked for him?—A. Up at Mr. Smith's—the mail carrier—it is the past summer. He didn't do no work, but he had the job.

Q. He supervised the work?—A. Yes, he came up there.

Q. He got the contract, didn't he?—A. Well, it wasn't a contract.

Q. He was responsible for the work?—A. Yes.

Mr. SPELL. That is all.

Redirect examination by Mr. DAWSON:

Q. You said something about the plaintiff supervising the job. Was he always on the job there?—A. Not all the time; no. A lot of times he wasn't able to go out. When I was on the job I run it.

Q. In other words, when you were there you were supervising it?—A. Yes.

Re-cross-examination by Mr. SPELL:

Q. The person for whom the work was done held Mr. Cox responsible for the job?—A. Yes, sir (R. 85).

* * * * *

SIDNEY H. SMITH was called as a witness for and on behalf of the plaintiff and, having been first duly sworn, was examined and testified as follows (R. 116):

Direct examination by Mr. DAWSON:

Q. What is your business or occupation?—A. I am a farmer.

Q. Do you know the plaintiff in this case?—A. Yes, sir.

Q. How long have you known him?—A. Approximately 15 years.

Q. Were you ever a mail carrier out of Ballston Post Office?—A. Yes, sir.

Q. During what period of time?—A. From 1924 until 1936.

Q. Is that during the same period that Mr. Cox was substitute carrier there?—A. He was a substitute carrier there from 1927 to 1936.

Q. Were you a regular carrier during that time that he was employed there as a substitute carrier?—A. Yes, sir.

Q. Did you become acquainted with him at that time, Mr. Smith?—A. I did.

Q. When did you first meet him, if you can recall?—A. I think it was in about 1925. I am not positive of that date.

Q. Did you see him at regular intervals from that time on until the office was discontinued there?—A. Yes, sir (R. 117).

Q. Did you have occasion, Mr. Smith, to observe his physical condition during that period of time?—A. Yes.

Q. Just tell the Court and jury what you noticed about Mr. Cox's physical condition during that time as you observed it.—A. Well, Mr. Cox was substituting for me and at times I would call him to work and he would be sick. Other times he would go for me and sometimes while in the office he would be sick and had to go into the drug store to get ammonia or something to brace him up so that he could continue his day's work. That happened off and on and I think for the whole time that he was working for me.

Q. What else, if anything, did you observe? Did you observe anything else about his physical condition?—A. Well, he would be fainting and short of breath.

Q. You say he was sick, Mr. Smith?—A. He would be sick.

Q. What do you mean by being sick?

The COURT. So far the witness has said Mr. Cox had fainting spells and shortness of breath.

The WITNESS. Well, at times he had to sit down or lean against the desk. He was short of breath, and pale at those times.

By Mr. DAWSON:

Q. How many times do you think that happened as far as you remember. Just approximately.—A. I would say a dozen or fifteen times during the time he was working for me (R. 118).

Q. Did you ever see him at any place besides when he was working as substitute carrier?—A. Oh, yes. I have been to his house to see him when he was sick and be in bed with high blood pressure or heart trouble.

Mr. SPELL. I object to that. I don't think he could know whether the plaintiff had high blood pressure or heart trouble.

Mr. DAWSON. I will agree that that may go out.

By Mr. DAWSON:

Q. Mr. Smith, during the time that you saw him in the house you say you saw him in bed there?—A. Yes, sir.

Q. How frequently did that happen?—A. Well, I suppose three or four times I have been in his house and he has been in bed. I asked him and he said he had high blood pressure because that is what the doctor——

Mr. SPELL. I move that that be stricken.

The COURT. Well, that can go out. It is not easy to pass on a question like that, but I will let it go out.

Mr. DAWSON. Very well, we will see what the condition was anyway, your Honor.

By Mr. DAWSON:

Q. Now, did Mr. Cox ever do any work for you personally?—A. Well, not personally. I had had him do some painting for me but he didn't do the work. He had men doing it. He brought the men to the house and they did the work.

Q. How big a job was that, Mr. Smith?—A. I suppose it was, probably four weeks' work or something like that (R. 119).

Q. Now, was he there all the time himself?—A. No, sir; he wasn't. Sometimes he would bring the men in the morning and go away and sometimes he didn't go away. He stayed around there a while and I have gone out and found him in the car just when he said he didn't feel able to go away at the present and he would wait until he felt better before he went back to his home.

Q. Now, from the time you first knew Mr. Cox down to the present time, has he, in your opinion, been well or sick?

Mr. SPELL. I object to that.

The COURT. Well, he can ask whether or not his condition has apparently changed. Have you seen him recently?

The WITNESS. Last summer, in July or August was when he was doing this work for me.

By the COURT:

Q. You have described his condition during the period that you have known him. Do you know whether or not there has been any change in his condition from the time you first came in contact with him up until the time you last saw him? Do you object to that question, Mr. Spell?

Mr. SPELL. No.

The COURT. I will overrule the objection.

Mr. DAWSON. The plaintiff adopts the question because I think it is very good and very proper.

The WITNESS. I don't think in my opinion that Mr. Cox is quite as able as he was when he was working for me on the mail route, but he is what I would say is a sick man or a man that isn't able to get out a day and do any manual labor.

Mr. SPELL. I will have to object to that (R. 120).

The COURT. I can't strike that out.

Now, gentlemen, I said four o'clock. Of course, that was facetious. You are going to finish with this witness. I think I should say, however, that I don't mind sitting a little late personally but we have to think of the 12 other people who have other duties. That is the reason that we should expedite it as much as we can. You complete your examination and don't hurry on that count.

Cross-examination by Mr. SPELL:

Q. I have just one question, your Honor.

Mr. Smith, a substitute mail carrier isn't on the Civil Service list, is he?—A. Not a rural carrier.

Q. How are they appointed? How do they get the position?—A. Well, the carrier tries to find someone that is not employed regularly who he can call on to run for him in the days that he is on vacation or sick or has to be away, and if this person is agreeable to the Postmaster, why, they appoint him and he is given bond.

Q. You thought Mr. Cox would be able to run your route satisfactorily if he were called on account of your sickness or your taking a vacation, did you not?—A. Yes, sir.

Q. How many years did he run that route for you under this condition?—A. I would say about nine years.

Q. Mr. Smith, you say you employed Mr. Cox to do some painting and papering for you this past summer? (R. 121.)—A. Painting, no paperhanging.

Q. This past summer?—A. Yes, sir.

Q. That was about a month's work?—A. About that; maybe five weeks. I don't remember exactly how long it took him.

Q. How many men did Mr. Cox have on the job?—A. Well, some days he would have two and some days three or four.

Q. You held Mr. Cox responsible for that work of these men?—A. I held him responsible for their being there and doing a good job.

Q. How much did you pay Mr. Cox?—A. I don't know that I could give you the exact figures.

Q. Approximately.—A. I think the job ran around \$500.

Q. Do you mean during the entire period that he was there?—A. Yes.

Q. You paid him and he paid his laborers?—A. Yes.

Mr. SPELL. That is all.

Redirect examination by Mr. DAWSON:

Q. Just one more question, please: Did you have any difficulty in getting a substitute mail carrier in Ballston?—A. Well, I did. I had two others the first two years I (R. 122) was there because it is very—well, the job is not very dependable, you know. You may get ten days sick leave and 15 days vacation, and the man who can get a regular job doesn't want to fool with anything like that, and the man after he gets a regular job quits any day and when you call on him he is not there; but after I had Mr. Cox, I had him the rest of the time that I was at Ballston and had no other trouble and no reason to look for another substitute.

Q. Were there times when you called him and he didn't come?—A. Yes sir (R. 123).

* * * * *

ROBERT CLEM was called as a witness for and on behalf of the plaintiff and, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. DAWSON:

Q. State your full name, please.—A. Robert Clem.

Q. Where do you live?—A. 911 North Greenbriar Street.

Q. Do you live with Mr. Cox?—A. I stayed at his place with my Aunt May.

Q. How long have you lived there continuously?—A. I have been there about six years. When I started to work down here.

Q. For the past six years?—A. Yes, sir.

Q. What is your occupation?—A. Working, helping a stone mason, and a brick mason.

Q. Have you worked in that occupation for the last six years?—A. Yes, sir; ever since I have been down here, since I (R. 126) have been here.

Q. About what wages do you earn, Robert?—A. I get 60 cents an hour.

Q. Now, are you one of the boarders at his home?—A. Yes, sir.

Q. Do you pay board to him?—A. To my Aunt May.

Q. How much a week do you pay?—A. Eight dollars.

Q. For the past six years have you been in that place, you say?—A. Yes, sir.

Q. During that time have you had occasion to see Mr. Cox frequently?—A. I saw him pass out many times.

Q. Have you seen him every day practically during that time?—A. Yes, sir.

Q. Tell the Court and jury, Robert, in your own language, just what you observed about Mr. Cox during that time.—

A. I seen him when he would go out, going out in the truck with some men and I would have to go home with him—before I went to work I would drive his car and get him to go to bed.

Q. Just tell the Court and jury how he looked and what you observed and what you noticed yourself.—A. Well, he looked to me he was feeling bad and he went to bed. He couldn't do nothing.

Q. Well, tell how he looked and what you saw.—A. Well, he looked very sick to me (R. 127).

Q. How long did that continue, Robert?—A. Ever since I have been knowing him.

Q. During the time that you have known him, the last six years, have you known whether he has done any work?—A. No, sir; I haven't never seen him do any.

Q. Are there other boarders in the place?—A. Three besides myself.

Q. Who are they?—A. One is my brother and the other is Hall, and the other one is a Graham.

Q. Do you know whether or not of your own knowledge whether they paid board?—A. Yes, sir.

Q. Who do they pay to?—A. My Aunt May.

Q. Does your Aunt May—What is her last name?—A. Clem.

Q. Mae Clem?—A. Yes, sir.

Q. During the last six years have you paid your board?—A. Yes, sir.

Q. Whom did you pay it to?—A. My Aunt May.

By the COURT:

Q. Do you know whether your brother pays board to your Aunt May?—A. Yes, sir.

Q. How much does he pay?—A. The same as I do, eight dollars (R. 128).

The COURT. Proceed, gentlemen.

By Mr. DAWSON:

Q. Eight dollars a week?—A. A week.

Cross-examination by Mr. SPELL:

Q. You say Mr. Cox looked sick ever since you know him?—A. Yes, sir.

Q. Does he look sick to you now?—A. Yes, sir.

Q. Does he look sick to you?—A. Yes, sir.

Q. How often did you drive Mr. Cox and his employees about their job?—A. I don't know exactly how many times, but I know—I remember a good many times.

Q. How many times a week would you drive him?—A. Well, sometimes three or four times a week.

Q. Well, how many times did you drive him last week?—A. Last week?

Q. Yes.—A. This week?

Q. This present week.—A. Three times already.

Q. And the week before that?—A. I don't know how many times. Not so many then.

Q. What time did you go to work, Robert?—A. Eight o'clock.

Q. Did you drive Mr. Cox to his work and then see him go (R. 129) to bed and then go to your work?—A. I took

him home and go back and get in my car and go to work.

Q. Do you have a car of your own?—A. Yes, sir.

Q. You say you drove four times this present week?—A. I said about three.

Q. Where did you take him on the job that you took him to?—A. I took him wherever men were supposed to be working.

Q. Where was that?—A. Down in Arlington and around.

Q. What street address?—A. The last one I think was on—some—I think it was Mohawk—I think it was.

Q. How many men did he have working there?—A. He had two there.

Q. During the month of November what other jobs did you drive him to?—A. Over here on Mr. Lunsford's work.

Q. How many men were on that job?—A. Three there.

Q. Sometimes Mr. Cox had more than one job going at one time?—A. No; just about one at a time.

Q. I say at one time he had more than one job going?—A. Just that one I go to and when he got done he would get another one.

Q. At times he has two jobs going at once?—A. Not at one time. At least I haven't been to all of (R. 130) them then.

Q. How many years have you been driving to those various jobs, Mr. Clem?—A. For him?

Q. Yes.—A. About—practically ever since I have been down there.

Q. That is six years?—A. Yes, sir.

Q. You have been driving him to jobs for a period of six years?—A. Yes; but not every day.

Q. In 1932, how many times did you drive him to jobs?—A. I didn't keep account of them.

Q. How many did you drive?—A. I don't know.

Q. Well, your best judgment. Would you say two dozen?—A. Something about like that. It wasn't any more if it was that many.

Q. You drove to two dozen jobs in 1932; is that right?—A. I don't think it was that many.

Q. How many, then?—A. I don't know. One or two dozen.

Q. Your best judgment.—A. It might have been 15 of them.

Q. Fifteen jobs in 1932?—A. Yes.

Q. Is that right?—A. Something about like that.

Q. How many jobs did you drive to in 1933? (R. 131.)—
A. I don't know.

Q. About the same number?

The COURT. He said he doesn't know. Proceed.

By Mr. SPELL:

Q. Did you work as many as a dozen jobs in 1933?—A. No; I don't reckon it was.

Q. Can you give us any idea how many jobs you drove him to?—A. It wasn't so many because then he could hardly get up and get around.

Q. Well, how many?—A. I don't know how many there were.

Q. Your best judgment.—A. It was a couple of them.

Q. You drove him a couple of times to jobs in 1933?—A. Yes; there weren't so many.

Q. How many jobs did you drive him to in 1934?—A. About a dozen, I reckon.

Q. Could it have been two dozen?—A. No; it couldn't have been two dozen.

Q. A dozen and a half?—A. No; I don't reckon it was. If it was a dozen it got the limit of it.

Q. A dozen jobs?—A. Yes.

Q. How many jobs did you drive to in 1935, Mr. Clem, two dozen?—A. No.

Q. How many? (R. 132.)—A. About a dozen, I reckon.

Q. About a dozen?—A. Yes.

Q. In 1936, how many jobs did you drive to?—A. There weren't so many that year.

Q. Well, your best judgment. How many?—A. It must have been a half dozen that whole year.

Q. The whole year of 1936; only a half dozen?—A. Yes.

Q. 1937. That is a fairly recent year. How many did you drive to in that year?—A. There weren't so many.

Q. Two dozen?—A. No; it wasn't two dozen.

Q. A dozen and a half?—A. It wasn't that.

Q. Well, what is your best judgment?—A. I don't know, but it wasn't so many jobs. I don't know how many there were.

Q. You say at least a dozen, don't you?—A. It may have been a dozen.

Q. In 1938, do you remember that clearly, how many jobs did you drive to in 1938?—A. I don't remember 1938 driving to about three jobs.

Q. He drove himself in 1938?—A. I don't know any.

Q. In other words, you don't know whether or not he did or not. You didn't drive him?—A. If he had any I would have known it (R. 133).

Q. You drove to about three in 1938?—A. Yes, sir.

Q. How many jobs did you drive to in 1939? You say you drove to four jobs this present week?—A. Yes, sir.

Q. Well, how many jobs did you drive in the last year; I mean 1939?—A. 1939?

Q. Yes.—A. I reckon about a dozen.

Q. About a dozen?—A. Yes; but there were one job at a time.

Q. I asked you how many jobs you drove to?—A. I said about a dozen.

Q. How many jobs did you drive to this present year, 1940?—A. About—I drove him to jobs—it has been about six jobs, if that many.

Q. About six jobs?—A. Yes.

Q. Did you work in Mr. Cox's garden for him?—A. Yes, sir.

Q. How large is that garden, Mr. Clem?—A. It is not so big.

Q. How much?—A. I don't know. It is about a little bigger than this room, if it is that big, I imagine.

Q. How large was it in 1935?—A. It has been the same ever since I know the garden (R. 134).

Q. Are the vegetables from his garden used in the home?—A. Yes, sir.

Q. Did you ever drive him to Mr. Pfeiger's meat market?—
A. Meat market?

Q. Yes.—A. I don't remember him working there. I know where the store was, but he never worked in it.

Q. You don't know of him working there; is that right?—A. Because I never seen him working there. I have been going over there because I know him myself.

Q. You say Mr. Cox has four boarders in his home at the present time?—A. Yes.

Q. What is the largest number of boarders he has had in the last year?—A. Ever since I have been there some come in and stay a couple of days and then go out.

Q. What is the largest number he has had in the last year?

Mr. DAWSON. I object to that. He has already testified it is his Aunt May.

The COURT. Of course, the witness is on cross-examination. It is all right.

By Mr. SPELL:

Q. What is the largest number of oarders that have boarded in Mr. Cox's residence in the last year?—A. The most I have seen have been six. They come in and stay two days—just, you know, when they get a job around there and then go away (R. 135).

Q. Well, what is the most that you recall who have boarded in the home prior to 1939?—A. Just now, like it is now—four of us.

Q. Does your brother work for Mr. Cox?—A. No, sir.

Q. Have you ever worked for Mr. Cox?—A. Well, I never charge anything; when I get off I help him.

Q. Did you ever work with him in his paper and painting business?—A. No, sir; because I never seen him doing nothing. He never done anything.

Q. You weren't present on the job, were you?—A. I would go there with him and I would bring him back because if I didn't I would lose my own.

Q. You don't know whether when you left him whether he went back to his job or not?—A. No, I don't know. I couldn't swear to that.

Mr. SPELL. That is all.

Redirect examination by Mr. DAWSON:

Q. I have one question. Will you tell the Court and jury who did the kitchen work?—A. My aunt.

Q. Who prepares the meals?—A. My aunt.

Q. And who serves the meals?—A. My aunt (R. 136).

* * * * *

CHARLES K. MASON was called as a witness for and on behalf of the plaintiff and, having been first duly sworn, was examined and testified as follows:

Direct examination by Mr. DAWSON:

Q. State your full name, please.—A. Mr. Charles K. Mason.

Q. What is your business or occupation?—A. Builder.

Q. Are you under subpoena by the Government in this case?—A. Yes, sir.

Q. Mr. Mason, do you know Mr. Cox, the plaintiff, in this case?—A. I do.

Q. How long have you known him?—A. Around about three and a half years.

Q. During that period of time have you been in the building and contracting business in Arlington County, Virginia?—A. Yes, sir.

Q. Have you had any business relationship with Mr. Cox during that period of time?—A. Well, he has been having my work done, painting and paperhanging on my houses (R. 137).

Q. How many houses have you been building during the last three and a half years where he has done papering and painting work?—A. I don't know exactly. I would say maybe 15.

Q. Do you mean five a year?—A. About that.

Q. What sized houses are they, Mr. Mason?—A. Just a small, five-room bungalow.

Q. Have you contracted with Mr. Cox to do that work for you?—A. I have.

Q. And what rate per house did you contract with him?—

A. One hundred dollars.

Q. That is for the papering and painting of them?—A. That is right.

Q. Now during that period of time, Mr. Mason, have you had occasion to observe Mr. Cox's physical condition during the last three and a half years that you have known him?—

A. Well, he has never done any work for me himself. He has men to do it for him.

Q. Well, have you been at your places, at the houses that you build, when they were working on that place?—A. I have; most of the time.

Q. Did you ever see Mr. Cox do any work himself?—A. No, sir.

Q. I want you to tell the Court and jury in your own language just what you observed about his physical condition as you saw it during that period of time.—A. Well, I hardly know what to say any more than he has (R. 138) complained to me several times about maybe his heart was bad, and he has on one or two occasions, I think the men took him home because he didn't feel like he could drive the car home. Outside of that, why, I don't know very much about Mr. Cox any more than I know so far of him being sick, because I have never been around except just on the job. There have been days when he didn't come on the job at all.

Q. Do you know of your own knowledge that some of his men ever took him home?—A. Yes.

Q. Was he performing any work at that time or attempting to perform any work?—A. No, sir.

Q. Now, Mr. Mason, can you give an estimate of how much Mr. Cox has profited on those jobs?—A. No, sir; I couldn't. I don't how much he pays his men, but I wouldn't think his profit was very much.

Mr. SPELL. I object, unless he knows, your Honor.

The COURT. The Court thinks that is admissible. The Court thinks that is admissible testimony.

By Mr. DAWSON:

Q. Do you want the question again, Mr. Mason?—A. Yes, sir.

Q. Can you give the estimate of how much Mr. Cox has profited on those jobs?—A. I really don't have any way of knowing.

The COURT. The Court will allow the answer to stand.

By Mr. DAWSON:

Q. By very much, what do you mean? (R. 139.)—A. I wouldn't think he would make over \$25 on the most on them.

Q. Have you employed him during the last year?—A. Yes, sir.

Q. Are all these contracts that you had with him on these small type of houses?—A. That is the only ones I build; just the small ones.

Mr. DAWSON. That is all.

Cross-examination by Mr. SPELL:

Q. Mr. Mason, how long have you been in business as a contractor in Arlington County?—A. I think as near as I can tell you about four years.

Q. How many houses do you average building a year?—A. I would say five, not over six. I have only built six once, and that was last year or the year before last. I average five.

Q. Have you given Mr. Cox a contract for painting and papering of those houses?—A. Yes; all but one.

Q. How much do you pay, Mr. Cox?—A. One hundred dollars a house.

Q. In addition to that you also furnish the material, don't you?—A. I do.

Q. Paper and paint?—A. Yes.

Q. Out of the hundred dollars you pay, he only pays the (R. 140) labor?—A. He has to furnish his brushes. I don't know how much expense that amounts to.

Q. And his labor?—A. Yes.

Q. How many men does he usually have on this job, Mr. Mason?—A. Well, usually from two to three. It just depends on how he is up on his work. If he is behind he brings in an extra man.

Q. Does he supervise the work himself?—A. Yes, sir.

Q. Is he there fairly regularly?—A. Most of the time.

Q. Is his work satisfactory to you?—A. It is.

Q. Do you hold Mr. Cox responsible for the jobs?—A. I do.

Q. Do you pay money directly to Mr. Cox?—A. Yes, sir.

Q. I believe Mr. Cox did some paperhanging in your residence in about 1935, didn't he? What year was that?—A. Well, he has papered and painted all the houses.

Q. I mean your home, your residence.—A. Where I am living?

Q. Yes.—A. I have been living where I am two years; a little over two years.

Q. I mean about 1935. Didn't he do some paperhanging (R. 141) for you in the home that you were living in at that time?—A. You just gave me the idea—I don't remember in 1935 just where that was because I was only renting rooms at the time when I first came up here.

Q. When you first took a residence, I mean first moved into a home, didn't he do some paperhanging in that home for you?—A. No, sir.

Q. Mr. Mason, when was the last job he did for you?—A. Three weeks ago.

Q. Where was that job located, Mr. Mason?—A. 720 North Edgewood Street, in Arlington.

Q. Do you know whether Mr. Cox had any other job on at the same time?—A. I think he did (R. 142).

* * * * *

Dr. RAY F. GUYNN was called as a witness by and on behalf of the plaintiff and, having been first duly sworn, was examined and testified as follows:

Direct examination by Mr. DAWSON:

Q. You may state your full name, please.—A. Ray F. Guynn, G-u-y-n-n.

Q. And what is your business or occupation?—A. I am a physician.

Q. And of what school are you a graduate?—A. George Washington University Medical School, 1921.

Q. And what experience did you have after the date of your graduation?—A. Following my graduation I went to

St. Elizabeths Hospital to intern, was there for several months. Following (R. 171) that I went with the Veterans Administration and entered neurology and psychiatry in 1937. Part of that time I was chief of the nerve and mental section of the Washington regional office of the Veterans' Administration. In fact, I did that for several years. Later I was transferred to the Diagnostic Center, Washington, D. C. There I was chief of the out-patient department for the neurology and psychiatry, and taught in the post-graduate school there. We ran for a period of two or three years. Since 1937 I have been in private practice of my specialty.

Q. And do you specialize in any particular branch of medical science, Doctor?—A. I do. Neurology and psychiatry, nervous and mental diseases.

Q. Now, for the information of the jury just tell us what that is.—A. Well, we just specialize in conditions of the mind and disorders of the emotions, physical disorders of the brain and spinal cord; in fact, all conditions affecting the nervous mechanism of the body.

Q. Dr. Guynn, do you know Mr. Cox, the plaintiff in this case?—A. Yes, I do.

Q. Did you ever have occasion to examine him?—A. Yes, I have examined him with the Veterans' Administration; I have examined him in my office, private office.

Q. When was the date of your last examination of him?—A. I examined him two days ago; that was November 26, 1940 (R. 172).

Q. Do you recall the first time you examined him as a mental and nervous specialist for the Veterans' Bureau?—A. No, I don't recall the first examination exactly.

Mr. DAWSON. Will you mark that as an exhibit [indicating]?

(Report of examination of plaintiff, consisting of four sheets, was marked "Plaintiff's Exhibit 1" for identification.)

By Mr. DAWSON:

Q. Doctor, I hand you Plaintiff's Exhibit No. 1, and I will ask you if that is a report of physical examination. I mean, of a mental examination you made of Mr. Cox, the plaintiff in this case?—A. It seems to be.

Q. And when was that made?—A. This was made April 4, 1924.

By the COURT:

Q. By you, doctor?—A. Yes, sir.

By Mr. DAWSON:

Q. And from what standpoint did you examine the plaintiff at that time?—A. I examined him from the standpoint of his nervous and mental condition.

Q. Doctor, for the information of the Court and jury will you state just how the Veterans' Administration physicians operated in the examination of a veteran?—A. Usually the patient has a general physical examination by the general medical physician. After that he's (R. 173) referred to the different specialists, depending upon what particular specialty he needs to be seen in. In this case, why, he was given a physical examination and referred to me for a special neuropsychiatric examination.

Q. Is there any significance in the fact that he was referred to you?—A. Well, the general physician no doubt thought that he needed a special examination.

Q. In other words, did you examine every patient or every veteran who was a claimant that came for examination?—A. Oh, no.

Q. Now, Doctor, will you state to the Court and jury the date of that examination and just what you found on him?—A. Well, this date, as I said before, was April 4, 1924, and I questioned him at length, and on my examination I found he had acrocyanosis of the hands and feet and hyperhidrosis of the hands and feet and axilla. In other words,——

Q. Now, just a minute. Explain that in your ordinary language to the jury.—A. In other words, his hands were extremely sweaty, and perspiration was marked in the hands and the axilla, and that was due no doubt to his hypertensive nervous condition.

Q. What else did you find, Doctor?—A. The pulse rate at the time of my examination was 100 at rest, 130 after exercise, and 90 after two minutes of rest.

Q. Well, can you tell the Court and jury what the normal pulse rate is of the average individual?—A. Normal pulse is 72, and after exercise it varies from (R. 174) 85 to 96, and usually returns to 72 or thereabouts after rest of two or three minutes. Of course, this is evidence of a rapid pulse, tachycardia of the heart; pulse was entirely too rapid.

Among other things, he had an aphonia: he had a loss of voice. He couldn't speak out loud. He couldn't speak at all. He seemed exhausted after the exercise. The statement I have here: "Easily exhausted after exercise."

Those were about the principal findings. Of course, I took his entire history, but you don't want that.

By the COURT:

Q. What did you say about his pulse?—A. His pulse was very rapid. It was 100.

Q. I know, but it was 100 at first?—A. Yes, sir.

Q. And then it went up to 140?—A. At 15—130.

Q. 130. And then it went back to the low?—A. Went to 96.

Q. 100, didn't it?—A. Went to 96.

Q. What did that mean, dropping below what it was before the exercise started?—A. Well, after exercise the pulse usually comes down, frequently comes below the original rate.

Q. Doesn't that indicate weakness? Or does it?—A. It indicates weakness, that it did not return entirely—it didn't return to normal, normal rate. Of course, it was the normal rate when it started.

Q. Well, I know, but if it was 100 at the beginning, and (R. 175) when it returned it went distinctly below 100; 96, did that or not, of itself, indicate weakness?—A. It did to me, your Honor.

Mr. DAWSON. Mark that [indicating] Plaintiff's Exhibit No. 2, please.

(Report of physical examination, dated March 14, 1929, was marked "Plaintiff's Exhibit 2" for identification.)

By Mr. DAWSON:

Q. Doctor, I hand you a paper marked for identification purposes Plaintiff's Exhibit No. 2 and ask you if that is the

report of an examination you made of Mr. Cox as a Veterans' Bureau physician.—A. Yes, it is.

Q. And what date did you make that?—A. This was made March 14, 1929.

Q. And what were your findings at that time, Doctor?—A. I gave him a diagnosis of psychoneurosis, moderate degree: that is, a moderate degree of disturbance of his emotional——

By the COURT:

Q. (Interposing.) Moderate degree of what, Doctor?—A. Psychoneurosis.

Q. You had better explain what psychoneurosis is.—A. Psychoneurosis is a functional nervous disorder manifested differently in different cases. They usually have dizziness, instability of the pulse; sometimes they have fainting attacks and sleeplessness, weakness, inability to work.

Mr. SPELL. I object to "inability to work." It invades (R. 176) the province of the jury. Only the jury can find whether the man is——

The COURT. He has given one of the symptoms of a disease.

Mr. SPELL. I understood him to say "inability to work."

The COURT. I say, that is one of the symptoms of the disease.

Mr. SPELL. That is the ultimate issue for the jury to try, your Honor. The Supreme Court has held that a doctor may not testify on that subject.

The COURT. Of course, the Court itself may disagree as to what the Supreme Court said.

Mr. SPELL. I refer to the Spaulding case, your Honor.

The COURT. The Court overrules the objection.

Mr. SPELL. Yes, sir.

Mr. DAWSON. Your Honor? Oh, your Honor has already ruled on it.

By Mr. DAWSON:

Q. Go ahead, Dr. Guynn, please, and tell us some of the other symptoms of psychoneurosis.—A. Of course, the symptoms, as I say, are different. You may have visceral symptoms, hysterical vomiting, or aphonia, inability to——

The COURT. Excuse me. And another thing, the doctor has only now undertaken to explain what this condition is, in answer to the Court's suggestion that he ought to explain what the disease is that he is talking about.

Proceed, Doctor.

The WITNESS. The patient may have dream states, hysterical trances, or can even have paralyses of the muscles not due (R. 177) to physical disease but due to the emotional disorder, confusion of thinking, et cetera. It's a functional nervous disease. We haven't been able to demonstrate any physical cause.

By Mr. DAWSON:

Q. Is it a real disease as far as the individual is concerned. Doctor?—A. Oh, yes.

Q. Is it a disabling disease, Doctor?—A. Yes.

Mr. DAWSON. Now, let's see. I should like to have his report: report of October fif—

By the COURT:

Q. (Interposing.) Doctor, I want to get it clear in my mind what it is.—A. Yes, sir.

Q. Is it, or not, a condition which doesn't necessarily culminate in manic depressive insanity but which does always precede a condition of manic depressive insanity?—A. It is a mental disorder, your Honor, and it is a forerunner frequently of manic depressive psychosis as well as other psychoses. Does that answer your question?

Q. Yes. I understood you to say it was functional.—A. Functional.

Q. And not organic?—A. That's right.

Q. And a manic depressive condition, as I understand it, is a func (R. 178) tional disorder.—A. That's right. That's right. Yes, that's also functional.

Mr. DAWSON. Very well, your Honor.

By Mr. DAWSON:

Q. May that continue over a period of years, too, Doctor?—A. It usually continues over many years.

Mr. DAWSON. And now, I should like to have his examination report of October 15, 1929.

By Mr. DAWSON:

Q. Doctor, did you make any other part of that examination from there other than the mental and nervous disabilities?—

A. Apparently I did.

Q. Well, just tell the jury if you did; you tell the jury, then, what you found, other than what would fall strictly within your scope of your examination as a mental and nervous specialist.—A. I beg your pardon. I did not do the general.

Mr. DAWSON. Now, have you got a clip there, please?

(A clip was handed to Mr. Dawson by the assistant clerk.)

By Mr. DAWSON:

Q. Doctor, I hand you a paper marked "Plaintiff's Exhibit No. 3" for identification purposes.

(Report of physical examination, consisting of two sheets, was marked "Plaintiff's Exhibit 3" for identification.)

Q. And ask you if that is a report of physical examination you made of Plaintiff in this case on October 15, 1929.—A. Yes; it is (R. 179).

Q. Well, tell the Court and jury just what you found wrong, if anything, with Mr. Cox at that time.—A. I made a diagnosis of neurasthenia, moderate degree, neurocirculatory in type. That is also one form of psychoneurosis. Neurasthenia is a form of psychoneurosis, and the "neurocirculatory in type" means that I felt the symptoms centered around his circulatory system; around his heart and his pulse and the blood system.

Q. Could that be caused, Doctor, by a man worrying about his heart condition to some extent?—A. It could to some extent; yes.

Q. Yes. Now, did you take his pulse at that time, Doctor?—A. I did.

Q. Will you tell the Court and jury what you found?—A. The pulse at that time was 96 standing, 130 after exercise, and 96 in two minutes; it returned to its pre-exercise level after two minutes of rest.

Q. How much manual effort should a man make who has a pulse rate of 96?—A. Well, it's a handicap; you'd have to consider other parts of the disability.

Q. Yes. Now, Doctor, I am going to ask you some medical terms and ask you to explain them to the jury before we go to your last examination:

The records in this case show Mr. Cox——

Your Honor, withdraw that question; I am going to ask the doctor for the purpose of continuity:

State to the Court and jury, when was the last time you ex (R. 180) amined Mr. Cox?—A. I examined him two days ago, in my office.

Q. In Washington here?—A. Washington, D. C., November 26, 16——

Q. (Interposing.) Doctor, did you give him a thorough examination at that time?—A. Yes; I did.

Q. And I want you to tell the Court and the jury just what you found upon that examination.

The REPORTER. 16?

The WITNESS. 1616 16th; at that address.

I went into his history thoroughly. I found that he had a leak in his heart known at mitral regurgitation.

Mr. SPELL. I object, your Honor. I think I understood him to say he went into his history thoroughly.

The WITNESS. This is my examination.

Mr. SPELL. Yes; but if he went into the history thoroughly and he examined him for the purpose of testifying in this trial. I object to his examination.

Mr. DAWSON. Well, then, let me ask you——

Mr. SPELL. Based on history.

The COURT. Just one minute. What say?

Mr. SPELL. I say he said he went into the history thoroughly; and if he went into the history and considered that in making his diagnosis, and that examination was for the sole purpose of testifying in this suit, I object to his examination.

The COURT. On what theory?

Mr. SPELL. Well, history, your Honor, given by a patient (R. 181) who wants to use a doctor to testify in a case has been held nonadmissible; and if his findings are based on that history, naturally the findings would be off.

The COURT. Well, you know, a physician who undertakes to make an examination without getting a background of

history, it seems to the Court, would be very unwise. If you want to argue to the jury later that the history was the basis of the doctor's findings, of course you would have a perfect right to do it. That is within the legitimate scope of argument. But to say that the doctor's testimony is not admissible because he got his information from the patient—which is, in medical terms, he got a history—the Court does not agree with you.

Mr. SPELL. Well, your Honor, I do not object to his physical findings he made at that time, but when he included in his diagnosis a consideration of the history which was given with the intention of having him to testify in this case, I do object to that. I think it colors his diagnosis; very prejudicial.

The COURT. The Court thinks that that is a matter which would involve, if it involved anything, the weight of the testimony rather than its admissibility. Of course, insofar as concerns the specific answer the doctor gave about the mitral murmur, he would have to find the mitral murmur himself; he couldn't find that from the history.

Proceed, Doctor, please.

Mr. DAWSON. Now, just a minute, Doctor. I want to ask you.

By Mr. DAWSON:

Q. The findings that you are now testifying to, are (R. 182) those found by your own examination and not based on history?—A. That's right.

Q. Is that right?—A. His weight was a hundred—

Mr. SPELL (interposing). I didn't get that answer, please.

The WITNESS. Yes, sir. His weight is 192 pounds, and his height was five feet ten inches. His blood pressure was 210/105; that's his systolic pressure. His top pressure was 210, and the lowest pressure—the diastolic we call it—was 105.

Q. Doctor, now let us explain that to the jury. What is the difference between the two?—A. Well, the systolic pressure—that is the highest pressure, you put a band around the arm, and you cut the pulse off, and then you let your pressure off of your band until you can just barely hear the

pulse again. That's called your systolic pressure. You keep letting your pressure off from the band until the pulse returns.

Mr. SPELL. I object to the witness reading from a paper unless it has been offered in evidence.

The WITNESS. I am merely explaining it.

Mr. DAWSON. He is not reading from the paper, Mr. Spell.

Mr. SPELL. It seems to me he is.

The COURT. He made an examination two days ago.

Mr. SPELL. Yes, your Honor.

The COURT. And he has this paper here, which I presume is your record; isn't it, Doctor?

The WITNESS. This is a record of my examination. It's not very good (R. 183).

The COURT. Which he is using, as I understand it, for the purpose of assisting his recollection; and there is no objection to it.

Mr. SPELL. No, your Honor; not if he looks at it and refreshes his memory, lays it down, and then testifies from the refreshed memory; I have no objection to that type of testimony; but if he reads it word for word, I ask that it be put in evidence.

The COURT. The Court overrules the objection. Proceed, sir.

The WITNESS. When the pulse first disappears, that's called the systolic pressure. When it returns it is known as the diastolic pressure. It is a matter of just putting pressure onto the arm to try to determine these two pressures. His arteries, his peripheral arteries—meaning the arteries in the arm: the radial artery and brachial arteries—were hardened. And I examined his eyes with the ophthalmoscope; that is an instrument where you look through the eye to the back of the eye; and the vessels, the arteries in the back of the eye, also showed evidence of being hardened.

By Mr. DAWSON:

Q. What is the significance of that, Doctor?—A. Well, it means that his hardening of his arteries has become general,

including the brain and the arteries leading particularly to the eye. It means he is——

Q. (Interposing.) Is that any indication of a heart disability, Doctor?—A. Well, it is evidence that the heart is also perhaps—the arteries are hardened perhaps (R. 184).

I also looked at the disc of the eye; that is, the optic nerve, the large nerve that comes into the back of the eye; and the head of that nerve—that is, where it comes in—seems to be undergoing some degenerative changes. I think he has an early primary optic atrophy. That is no doubt brought on by the hardening of the arterial vessels.

His heart was enlarged some on percussion. That is, we palpate the heart, and by the difference in sounds we try to determine whether it is enlarged. We thought—I thought it was a little enlarged to the left and a little downward. The sounds you hear in different places of the heart. You hear them in this on the right, called the aortic area; on the left, pulmonary area; and down where the apex of the heart, lower down—you listen at those three places particularly for the sounds of the heart. If the sounds up on this side seem a little snappy—and the heart usually has two sounds: kind of a glub-dub sound. In this case you can just hear about one sound. It means there is some disorder, I think, in this valve, but it's not a regurgitation; it's just a snappy sound.

His ankles were swollen. Both ankles were swollen, and on pinning the ankles with your finger you find that there is a dent; the depression stays for a moment. It's indicative of some failing compensation of the heart. I mean that the back flow of the venous blood to the heart is slow because of poor action of the heart. Therefore the fluid sort of accumulates in the extremities. We speak of it as edema.

Q. Is swollen feet, Doctor, over a period of time—is that one of the signs and symptoms of a heart disability?—A. Yes; it frequently is (R. 185).

Q. Go ahead.—A. After exercise I had him—his pulse was rapid, about 88 before exercise and 110 after exercise, and it came down to about 80. He has showed some embarrassment of his cardiac—some distress, shortness of breath, as

if or as though the fifteen hops on each foot had given him a little more exhaustion than you would expect.

I examined his chest, and I didn't find any active condition in his chest, but his inspiration is sharpened, and there are rough breath sounds in the chest and evidence of healed condition.

Q. Would that be known as calcification, Doctor?—A. Probably a fibrosis, probably a connective tissue, threads of tissues formed where there was disease at some time. I assume that he had—I didn't examine his chest; I drew the conclusion that perhaps he had had some active process in the chest.

Q. In that condition, Doctor, would a man have some destruction of his lung tissue?—A. Yes; he would have some inactivity of the lung tissue and perhaps also some—

Q. Where did you find that particularly?—A. Well, you find it in the apex, and then I found some—his breathing is shallow: it does not go as far down into his chest as it should. I assume that the base, the lower portion, is not perhaps as active as it should be.

Q. Did you find it on both apexes?—A. Yes. Emotionally he is unstable, he is easily excited and worried, and his memory to me seems faulty, although (R. 186) he denies it.

By the COURT:

Q. His memory? What is that, sir?—A. Memory. In asking him dates and things, it seems faulty. I felt that he was suffering from an anxiety neurosis or psychoneurosis anxiety type, associated with his other disabilities: made a diagnosis of general arteriosclerosis, moderate degree; "arterial hypertension"—and that means the high blood pressure. "Arterial hypertension severe; retinal arteriosclerosis": that is hardening of the arteries of the eye. "Primary optic atrophy, valvular heart disease, mitral stenosis and mitral regurgitation with partial decompensation and possibly renal involvement": that means kidney: possibly kidney involvement. I didn't examine his urine.

By Mr. SPELL:

Q. You didn't examine what, Doctor?—A. His urine.

By Mr. DAWSON:

Q. Doctor, this psychoneurosis that you found there, could that be caused by a man worrying over his physical condition?—A. Well, it's a factor. Certainly a factor; yes, sir.

Q. Yes. And is that a frequent disability in tuberculosis cases?—A. Fairly often.

Q. At the time you examined the plaintiff in this case—these are just the physical findings that you made?—A. Physical and mental findings.

Q. Yes. Are they based on your physical findings, what (R. 187) you yourself found by the use of your instruments?—A. Yes; and observation of his emotional system.

Q. Now, you might tell us, Doctor, what you mean by mitral stenosis.—A. Well, mitral stenosis means that the valve of the heart is not normal. It frequently becomes hardened and unelastic. Sometimes the opening becomes smaller because of the hardening around the edges due to changes going on in the heart musculature and tissues.

Q. Is that in relation to the mitral valve, Doctor?—A. Yes; I am talking about the mitral valve. And as the blood goes in, you have a smaller opening. When the blood comes through, it doesn't have as large an opening as it normally does, and it makes a sound because it doesn't have that regular opening it usually has. So when the heart starts to contract then after the blood gets in the valve will not close completely, because it's patent: therefore, blood will—as the heart contracts to push the blood up, some of it will go back, producing what we call regurgitation, because the valve cannot be closed completely.

Q. In other words, there is a wash back there; is that what you mean?—A. Yes.

Q. How does that disable the person, Doctor?—A. Well, it interferes with the circulation of the blood, the nutrition of the body, and the function of the different other organs such as the kidney and the liver, et cetera, and also the—

Q. (Interposing.) Applied to a mechanical device, would it be somewhat like a leaky valve of an automobile engine? (R. 188.)—A. Similar; yes.

Q. Now, Doctor, the records in this case show that this plaintiff was discharged from the military service for valvular heart disease, mitral regurgitation. Is that the same diagnosis that you made in your examination of this man?—A. All except I had aortic—mitral stenosis.

Q. And you also found mitral stenosis?—A. Yes.

Q. Doctor, is that a permanent disability?—A. I think it is. Sure it is.

Q. The records of the War Department also show that this plaintiff had a mitral regurgitation and a decrease in cardiac compensation subsequent to rheumatic fever. How does that compare with the diagnosis which you made in the case?—A. Well, that's almost the same.

Q. Is it a usual or an unusual thing for a patient to have a heart disability from rheumatic fever?—A. That is a usual complication of rheumatic fever.

Q. What do you mean my decompensation, Doctor?—A. It means the heart is not taking care of the circulation properly, and there becomes a congestion in the body, in the liver and other organs of the body, because the venous blood—that is the dark blood, darker blood—is not being carried to the heart as fast as it should; allows it to accumulate in the—doesn't take care of its work.

Q. Now, the reports, the undisputed records in this case, show that on August 23, 1918, the plaintiff was examined by one W. R. Jones, a surgeon of the Public Health Service, and a diagnosis of chronic endocarditis with mitral regurgitation (R. 189). How does that compare with what the diagnosis was that you made on your last examination?—A. Well, it's practically equivalent.

Q. The diagnosis made on report of the examination shown by the undisputed records on August 9, 1919: examination by W. J. Heffner, Public Health Service physician, made a diagnosis of mitral regurgitation with broken compensation. How does that compare with the—A. About the same.

Q. Did you find broken compensation?—A. I didn't find completely broken, no. Partial.

Q. Also, what is the accepted cure for that, Doctor? Is there any cure for mitral regurgitation?—A. No cure that I know of.

Q. What do you advise a patient to do who is suffering from that type of disability?—A. Well, he would have to lead a very careful life and watch his eating habits, plenty of rest, avoid excitement, avoid strenuous work, et cetera. Perhaps some drugs, digitalis.

Q. Would it be dangerous to the health of an individual such as that to engage in any occupation?

Mr. SPELL. I object to that, your Honor. He may state what effect it would have on his health.

Mr. DAWSON. I withdraw the question.

By Mr. DAWSON:

Q. What effect would it have on the health of an individual who was suffering with that type—A. Well, the patient in those conditions usually feels more or less like an invalid, and they feel—they are conscious (R. 190) of their disability; and to work strenuous work continuously would certainly be unwise and would not be recommended. Their health would be impaired further without considerable care as to their activities.

By the COURT:

Q. When you say "work," you mean manual work, don't you?—A. I am speaking of manual work.

The COURT. Yes.

By Mr. DAWSON:

Q. From your examination of the plaintiff at this time, you think his mental condition is such that he is able to concentrate on what to do?—A. Not—

Mr. SPELL. I object to that as invading the province of the jury.

Mr. DAWSON. Well, he had already testified to manual. We want to go into the mental situation. I think that is a proper question.

Mr. SPELL. No.

Mr. DAWSON. Whether he is properly fit to do any kind of work.

Mr. SPELL. No. That is clearly inadmissible. He is called in the case—that is the ultimate issue to be decided. He may testify as to what effect activity of a manual nature would have on his health; but as to whether or not he is able to do a job, that is something for this jury to say.

I object to the question.

Mr. DAWSON. Well, then I shall ask him another question which I know is proper (R. 191).

By Mr. DAWSON:

Q. Doctor, from your examination of the plaintiff in this case what is your opinion as to whether the plaintiff would be able to concentrate on any problems sufficiently, from a mental standpoint?—A. My opinion is that he could concentrate mentally or for a short period; but as to concentrating continuously enough to hold a full-time position, I don't think he can.

Q. Now, Doctor, report of physical examination made here in 1919, on May 6th, by H. E. Trimble, Assistant Surgeon of the Public Health Service: makes a diagnosis of chronic pulmonary tuberculosis. Now, would that diagnosis in any way check in with the condition you found in this plaintiff's chest?—A. I thought perhaps he had had tuberculosis, but I didn't make a definite diagnosis. It fits in in that way.

Q. Also the report of physical examination February 8, 1922, made by P. P. Crimmins, Public Health Service: makes a diagnosis of moderately advanced tuberculosis of both lungs. Doctor, would the arrested condition which you found in his lungs be indicative of that or confirmatory of that diagnosis?—A. It would.

Q. A report of physical examination made by Henry Lee Smith, Cardiovascular Specialist of the Government, dated February 9, 1925; 1923, isn't it?

Mr. MILLER. '23.

Mr. DAWSON. '23 or 5.

Mr. MILLER. '23.

Mr. DAWSON. '23. It is a diagnosis of astenia, neuro-circulatory (R. 192), right.

Mr. SPELL. Slight.

Mr. DAWSON. Slight, rather. Yes.

By Mr. DAWSON:

Q. Would that be indication of the same disability which you found, Doctor?—A. Yes.

Q. A mental and nervous examination dated February 9, 1923, by a Government physician, gives a diagnosis of hysteria. Where is the borderline between psychoneurosis and hysteria, Doctor?—A. Hysteria is one form of psychoneurosis.

Q. Does that diagnosis check with what you found on your examination?—A. Yes.

Q. Diagnosis made on January 15, 1926, by A. E. Marland, Mental and Nervous Specialist, makes a diagnosis of hysteria, with a notation that the same may be considered permanent. How does that check with the diagnosis you made?—A. That checks with my diagnosis of his mental condition.

Q. Examination made on March 10, 1928, by several physicians of the Veterans' Administration Dispensary: it gives a general diagnosis of tuberculosis, pulmonary, chronic, minimal, arrested; psychoneurosis, hysteria, moderate. Does that check with your diagnosis, Doctor?—A. "Psychoneurosis, hysteria, moderate" checks with my diagnosis. The other, I didn't make a definite diagnosis, but I found evidence of what I thought was tuberculosis.

Q. Now, an X-ray or fluoroscopic finding made March 12 (R. 193) 1928, shows, "Radiostereoscopic examination of the chest shows some increase at the hilus and throughout both lungs." Doctor, in your percussion of this man's chest at the time of your last examination would that check with the radiogram or fluoroscopic examination?—A. It checks fairly well.

Q. The examination that's your own. Examination made October 17, 1929. General examination: "Neurasthenia, moderate degree, neurocirculatory in type." Does that diagnosis check with about what you found wrong with this man on your last examination?—A. Yes.

Q. And the one on December 3, 1930, by Dr.—I am sorry, Doctor; that is your own examination. Examination made on August 25, 1932, by Dr. R. W. Brown, makes a diagnosis of psychoneurosis. That checks with yours?—A. Yes.

Q. Also a general diagnosis at the same time by J. A. Connor, heart specialist, of "Neurocirculatory asthenia, severe." Now, how does that—A. That checks with the neuropsychiatric examination.

Q. One on April 22, 1936: diagnosis, or report of physical examination, rather, by Max Faber, with a diagnosis of "Psychoneurosis, mixed type, moderate." Does that check with yours?—A. Yes.

Q. And a "psychoneurosis, neurasthenia, moderate," on the last examination here, made in October 1936. Would that be the same thing as you found in this man? (R. 194.)—A. Yes.

Q. Doctor, where from 1926 down to the present time, as shown by the reports of Government's physicians, there has been a diagnosis made of psychoneurosis or hysteria, where that has existed over a period of some 14 years, what is your opinion as to whether or not the condition at its inception was a curable or an incurable condition?—A. It was incurable.

Q. From what date, Doctor?—A. From the first time it was noted, even.

Q. Doctor, where the Government's own Army physicians have found a mitral regurgitation with decompensation in 1918, and that finding was correct—we've got to assume for the purpose of the record it was a correct finding—and you have a history shown by the sworn testimony in this case that from the time of the plaintiff's discharge from the Service he has had swelling of the feet; that he has had dizzy spells; that he has been unable to make any sustained effort as far as work is concerned—

The COURT. Physical work.

Mr. SPELL. I object to that.

By Mr. DAWSON:

Q. (Continuing.) Physical work is concerned; that he has been able to drive a car a little bit, and all that; and you come down to the date of your examination you made three or four

days ago; bearing in mind your examination and the history, that the plaintiff has done little if any work except vocational training during the early part of 1919 to 1922, do you have an opinion, can you express an opinion, whether the (R. 195) valvular heart disease, mitral insufficiency with regurgitation, was a curable or incurable disease back in 1918?

Mr. SPELL. I object to that question, your Honor. That doesn't show a complete picture, and the evidence in the file here which counsel has read in evidence hasn't been given to the doctor. He has just got a partial picture. And also he is asked to pass upon the correctness of another doctor's diagnosis; that I don't think one doctor should weigh another doctor's diagnosis.

The COURT. Let us see if I can take care of that. Let us see if I can ask a question that would suit you both.

Mr. DAWSON. Very well, your Honor.

By the COURT:

Q. Doctor, is a mitral regurgitation curable? In other words, can a valve ever be cured?—A. I do not think it can, your Honor.

The COURT. Does that cover your case, or doesn't it?

Mr. SPELL. No, your Honor. Indeed not.

The COURT. I mean does that satisfy you?

Mr. DAWSON. I think that is all I want to ask you.

The COURT. Is that satisfactory to you?

Mr. DAWSON. That is very satisfactory, your Honor.

The COURT. And you object to it?

Mr. SPELL. Yes, your Honor.

The COURT. The Court overrules the objection.

Mr. SPELL. I have to.

The COURT. The Court overrules the objection.

Mr. SPELL. I shall be glad to state my grounds, your Honor (R. 196).

The COURT. All right, sir.

Mr. SPELL. The report is filled with examinations and diagnoses of the heart, finding no heart condition from beginning—

The COURT. There was a mitral regurgitation away back in 1924, as I remember.

Mr. SPELL. Beginning, your Honor—no.

Mr. DAWSON. In 1918, your Honor, they discharged him for it.

Mr. SPELL. Beginning 1919, up until and including 1936, there have been about 40 or 50 examinations made of this man, and they haven't found it on one occasion; and I say, to say that the man—to assume——

The COURT. (Interposing.) Well, I misunderstood the record, then. I understood that the mitral regurgitation was found certainly back in 1924.

Mr. SPELL. And not since, your Honor.

Mr. DAWSON. It was found in 1918 and 1922, and there may be some examination where they didn't find it; but the point is, that I wanted to bring out here, that once you have a leaky valve, nature doesn't repair that at all.

The COURT. That is exactly the question I asked, and the doctor said it wasn't curable.

Mr. DAWSON. Yes.

Mr. SPELL. Well, your Honor, I don't find that the examination of 1919——

The COURT (interposing). It does not make a particle of difference about that. The doctor as an expert has a right to testify, when a valve once gets in a situation so that it won't close up (R. 197) tight, as to whether or not it can ever be cured. He has the right, if he knows, to say whether in his opinion it can or it cannot, and he says it cannot, in his opinion.

Mr. SPELL. Your Honor, my objection was aimed, of course, at the fact that there wasn't a correct diagnosis.

The COURT. What say?

Mr. SPELL. That that wasn't correct, as shown by the numerous diagnoses, examinations thereafter throughout the years.

Mr. DAWSON. Well, your Honor, that goes——

Mr. SPELL. Throughout the years.

The COURT. The Court has found in the record evidences of a mitral regurgitation prior to the first of May 1927. There

certainly is in the record evidence of mitral regurgitation prior to May 7, 1927—May the first—June the first 1927.

Mr. SPELL. The latest one I find, your Honor, is April 9, 1919.

The COURT. No. He has a right to ask this witness, as an expert, as to whether or not this mitral valve can ever be healed. He says in his opinion it cannot, and the Court overrules your objection.

Mr. DAWSON. You may have the witness, Mr. Spell.

Cross-examination by Mr. SPELL:

Q. Dr. Guynn, you examined the plaintiff, Mr. Cox, two days ago, on the 26th of November, didn't you?—A. That's right.

Q. Did Mr. Cox give you a history at that time?—A. I questioned him about his history.

Q. Did you put it down on the paper? (R. 198.)—A. I have the notes here.

Q. May I see them, please, sir?—A. They are not complete; I'd hate to let you try to read them because, you see, they are my own.

Q. Yes, sir. I'd like to see them.

(The witness handed to Mr. Spell two pages of longhand notes.)

The WITNESS. I intended to dictate the record, and I didn't.

By Mr. SPELL:

Q. Did you put down here all that you found, all your diagnosis at that time?—A. It is not all on there; no.

Q. I see here that you make—can you read that, please, Mr. Guynn, No. 3 [handing paper to the witness]?—A. Three?

Q. Yes.—A. I didn't testify as to that. I said that is pulmonary tuberculosis arrested; "history" written after it in parentheses, meaning that that was history.

Q. You didn't find it yourself, did you?—A. I found certain things that did not make a diagnosis of tuberculosis.

Q. Not sufficient to make a diagnosis of tuberculosis?—A. That's right.

Q. Will you explain what tachycardia is, Doctor?—A. It's a rapid heart.

Q. That is not an organic disability, is it?—A. It may be; either organic or functional (R. 199).

Q. Pulse rate of a person 49 years old, as Mr. Cox, does not usually have—in other words, a man of 49 years of age doesn't usually have a pulse rate of 72, does he?—A. Frequently. More than——

Q. It is not unusual for it to be high in a man of that age, is it?—A. Well, it happens. I don't know whether it's not unusual. It can happen.

Q. A man 49 years of age, it is not unusual, is it, for him to have a little hardening of the arteries? Is that right?—A. How old?

Q. 49 years of age.—A. It is a little unusual.

Q. Happens very often, though, doesn't it?—A. It happens often.

Q. That in itself doesn't incapacitate a person very much, does it?—A. Oh, yes.

Q. Many people that you have treated have had hardening of the arteries and have been able to carry on in the usual occupations, haven't they?—A. Some of them.

Q. That in itself isn't indicative of a heart condition, is it?—A. It usually is.

Q. You wouldn't want to make a diagnosis of an organic heart condition solely on the hardening of the arteries, would you?—A. If it were general throughout, I would (R. 200).

Q. Well, Doctor, when Mr. Cox came to see you, did he tell you that he wanted you to testify in this case?—A. I declare, I don't believe he mentioned it.

Q. Did you know you were to testify in this case?—A. Yes, sir.

Q. Who told you that?—A. Mr. Dawson.

Q. Did he discuss a history of the case with you?—A. No.

Q. At that time?—A. No; not particularly.

Q. Well, "not particularly," what do you mean by that?—A. He said the patient had a record of disability.

Q. What disability?—A. He didn't tell me all the disabilities. I don't know. He didn't say particularly.

Q. What did he say about the record, history of a heart condition?—A. He said he had a record of a nervous condition and a heart condition. That's about all he said.

Q. Did he tell you at that time that the man had been examined on numerous occasions after 1919, and had never found any organic heart trouble?—A. No.

Q. Did he tell you that?—A. I don't believe he did.

Q. But he did tell you in service that he was given a diagnosis of mitral regurgitation with broken compensation?—A. No; he didn't tell me that. He didn't (R. 201).

Q. What did he tell you about that at that time?—A. He said he had a diagnosis of heart condition, as I remember.

Q. Yes.—A. That was before I saw the patient.

Q. Yes; you didn't examine Mr. Cox to give him any treatment, did you?—A. Not particularly.

Q. Yes.—A. I examined him for the purpose of finding out his condition.

Q. So that you could testify in this case?—A. I suppose so.

Q. Well, now what kind of examination did you give him to determine that he had a heart condition?—A. Well, I told you that I took a very thorough history, more so than is on that paper that you hold in your hand there. That is just a few notes that I was going to dictate.

Q. Did you take that history?—A. Well, I listened to the history, but we can't make a diagnosis on history, you know. We have to examine a patient.

Q. You considered the history in your diagnosis, though, didn't you?—A. I didn't consider it particularly in the conclusions. It colors it, I suppose, but we have to make the diagnosis from what we find, you know.

Q. Well, you did consider it to some extent, didn't you?—A. Oh, not in the complete diagnosis; no. He had enough evidence in front of me to make the diagnosis (R. 202).

Q. But at the same time, you did consider it to some degree didn't you?—A. No; I didn't consider it in making the conclusions.

The COURT. The doctor says this. The reason I am interjecting is that the question has been asked several times. The doctor says this: He did take a history, but that after he

made the examination he found that he could reach a conclusion satisfactory to him without considering the history at all; is that true, Doctor?

The WITNESS. That's right.

The COURT. Now, proceed.

By Mr. SPELL:

Q. Well, Doctor, did you take an X-ray of the man's heart?—A. No; I did not.

Q. Would that have been helpful in reaching a conclusion?—A. Not in this case, particularly.

Q. You would like to have an X-ray, though, before you make a diagnosis of heart trouble, wouldn't you?—A. It depends on the case.

Q. You usually do it, don't you?—A. Not usually; no.

Q. How many patients a year do you examine?—A. You mean in private practice?

Q. Yes, sir.—A. Every case I examine, I usually go over them physically and examine their heart, even though I am treating them for a nervous condition.

Q. Yes. That's right. Do you make an electrocardiogram? (R. 203.)—A. Frequently order so.

Q. Is that helpful?—A. It is at times.

Q. Did you make it in this case?—A. No; I didn't.

Q. Would that have been helpful?—A. It wasn't necessary.

Q. You usually make it, don't you, just to be sure?—A. I know his condition. In a marked case you don't need it.

Q. In other words, you didn't need to have an X-ray or electrocardiogram even though the man had been examined for a period of 20 years, and never found any heart condition? You were willing to make a diagnosis of a heart condition?

Mr. DAWSON. I object to that. That is not in the case at all.

The COURT. The Court does not think that is proper to make. There is plenty of evidence in the record of mitral regurgitation prior to 1927.

Mr. SPELL. Your Honor, we will put that in. He has put in enough of that to make a competent question.

The COURT. But, my dear sir, you don't seem to understand that the plaintiff's testimony must be considered as well as the defendant's. Just because in your opinion——

Mr. SPELL (interposing). I didn't say——

The COURT. Just one minute.

Mr. SPELL. Yes, sir.

The COURT. Just because in your opinion there was no mitral regurgitation doesn't mean that the plaintiff's testimony (R. 204) as to mitral regurgitation shall not be considered.

Mr. SPELL. Yes, sir.

The COURT. And there is in the record plenty of evidence of mitral regurgitation.

By Mr. SPELL:

Q. Did you make a diagnosis of any nervous disability?—

A. I did.

Q. At that time?—A. This last, you mean?

Q. Yes.—A. I did.

Q. Do you have it down here [indicating paper]?—A. I believe it's down there. Let me see.

Q. Yes.

(The witness examined the paper referred to.)

A. I will see if it is [examining paper further]. No; it's not on here.

Q. Yes. Didn't put it on the paper, did you?—A. No. I was going to dictate the report, and I didn't get it done.

Q. Doctor, if a man has a diagnosis of neurocirculatory asthenia, severe, on August 30, 1932, and on October 29, 1936, he is given a diagnosis of psychoneurosis, neurasthenia, moderate, would you say that his condition had improved?—A. From what date?

Q. The first date I gave you, Doctor, the first diagnosis, was August 30, 1932.—A. Diagnosis?

Q. Of Neurocirculatory asthenia, severe; and on (R. 205)—A. He hadn't improved, I'll answer it.

Q. Don't think he's improved any?—A. (The witness shook his head.)

Q. Doctor, wouldn't you like to have a man under your observation more than just a few hours before you would make a definite diagnosis of heart condition?—A. Depends on the case.

Q. Wouldn't you like to have had Mr. Cox?—A. No; I wouldn't need that with him.

Q. Yes.—A. His condition is rather marked.

Q. Yes.

The COURT. Just one minute.

By Mr. SPELL:

Q. The plaintiff has—

The COURT. Just one minute, because I want to clear this up: Speaking of this mitral regurgitation, doesn't the record show that the examination showed that he had this mitral regurgitation before he ever went into the service?

Mr. DAWSON. It shows that he had one of it. No. But it was aggravated in the service.

The COURT. I am not talking about whether it was aggravated, but doesn't the record show?

Mr. DAWSON. Yes; it does.

The COURT. Doesn't the record undertake to state that he had this mitral regurgitation before he entered the service?

Mr. DAWSON. Yes.

The COURT. That is my recollection.

Mr. DAWSON. Yes (R. 206).

The COURT. Now proceed.

Mr. SPELL. Yes; your Honor.

By Mr. SPELL:

Q. As part of the plaintiff's case, there appears an examination, X-ray of chest dated October 17, 1929, by Dr. Elwood, roentgenologist, which states, "Radiostereoscopic examination of the chest shows thorax, heart, and diaphragm normal"; and on March 14, 1929, as part of the plaintiff's case it is stated, and they put in evidence this report: "Heart: No murmurs, accentuations or arrhythmia. Lungs: No abnormal signs."

Doctor, that does not check with your findings? Did it?—
A. You said arrhythmia? Arrhythmia? Arrhythmia?

Q. Yes. Said "No murmurs, accentuations, or arrhythmia."—A. No; that part didn't check.

Q. It does not check, does it? Your opinion, that you had had that information, would you have said that the condition had its onset prior to the date of your examination on the 26th?—A. That wouldn't be enough—

Q. Accepting that as true.—A. That wouldn't be enough to convince me.

Q. You would still date the beginning of the heart condition you found prior to these dates [indicating report]?—A. Well, I can only date—make an opinion as to what's given me, you see, as to when it began. I have a definite opinion that he has one now of severe degree and that it has been present for a long, long time, I don't know how long, from my own personal examination of his heart.

Q. But accepting this as true, you wouldn't say that he (R. 207) had it at that time, would you?

The COURT. The doctor may not be asked that question if he doesn't—

Mr. SPELL. I withdraw that question, your Honor.

By Mr. SPELL:

Q. Doctor, in what clinical group is psychoneurosis divided into?—A. What clinical groups?

Q. Yes, sir.—A. Well, psychoneurosis, as I said, is a functional mental disorder.

Q. Yes.—A. It belongs to the group of minor psychoses, some authorities say. Psychosis means insanity. They mean it's a minor insanity. Some authorities say that.

The COURT. Mr. Spell, will this examination be prolonged? Because if it will, I think I shall take a recess now. Otherwise I shall let the doctor conclude, because he probably wants to get away.

Mr. SPELL. I have a few more questions; I think probably in 15 minutes, your Honor.

The COURT. All right. Proceed.

By Mr. SPELL:

Q. What divisions are there of psychosis? I mean, of psychoneurosis?—A. As to what?

Q. How is it divided, into what divisions, clinical divisions?—A. Psychoneurosis? (R. 208.)

Q. Yes.—A. You have the hysteric type, neurasthenic type, psychasthenic type, anxiety type, mixed type. Some of them say they have a neurocirculatory type; that is usually a form of neurasthenia.

Q. Well, Doctor, isn't it a fact that neurasthenia, which is a division of psychoneurosis, and insanity are fundamentally distinct and different diseases?—A. I just said that we think, many people think, that a psychoneurosis is a forerunner of insanity and speak of it as a minor psychosis (R. 209).

Q. I will ask you also isn't it a fact that neurasthenia does not end in insanity, no matter how long it persists?—A. I didn't say that.

Q. You know that that is held by many medical authorities, don't you?—A. I don't think so.

Q. Yes.—A. Can't say it. We don't know how it's going to turn out.

Q. Well, Doctor, have you treated many patients who have had a diagnosis of psychoneurosis, neurasthenia, moderate?—A. A great many.

Q. How many have you treated this year?—A. I don't know. I treat on the average of from six to ten a day; perhaps not that many psychoneuroses. Maybe four, five a day; maybe I had better cut that down.

Q. Well, now, a person who has a diagnosis of "psychoneurosis, neurasthenia, moderate"—isn't that susceptible to cure?—A. Seldom. Not often.

Q. Haven't you had patients who were cured?—A. I had one or two I thought I cured.

Q. What is your course of treatment, Doctor?—A. Well, there are different methods of treatment. Sometimes we try to treat them, give them some medicine. Sometimes we give them what we call psychotherapy, which is to kind of sit

down and talk over the patient's condition and conflicts and try to straighten them out with him in his mind, see how long they existed, when they began, and try to (R. 210) get him to understand the cause and become conscious of how he got that way, and hope that his increased insight will help him to get along with his disability.

Sometimes we treat young patients that are not too old, up to 45, with psychoanalysis. In that case we have the patient lie down on a couch and sit behind the patient and let him talk, in hopes that by free association we will get some deep material from his mind which will be indicative of the cause of his condition, and also purge his mind of the gunpowder, or whatever you want to call it.

Q. Well, Doctor, isn't regular physical exercise important in the treatments of that disease?—A. Neurasthenia?

Q. Yes.—A. Employment is important. I don't know about physical exercise.

Q. Employment is important?—A. Yes.

Q. Well, in treating a neurasthenia isn't your object to divert the patient's mind, that is, from himself?—A. That's right.

Q. Yes.—A. That is part, one thing.

Q. Is not this best done by having the patient engage in some suitable employment?—A. If he is able; yes.

Q. You have many patients whom you prescribe that course of treatment to, don't you?—A. Well, I have to take—yes, I do, if that's all he has (R. 211) and if the age group is right.

Q. You wouldn't advise a person who has neurasthenia to do nothing but rest, would you, Doctor?—A. No.

Q. As a matter of fact, that would be the worst thing he could do after a time, wouldn't it?—A. Well, it wouldn't be helpful.

By the COURT:

Q. When he gets so that he can engage regularly in an employment and forget himself, he is cured, isn't he, Doctor? That is the size of it, isn't it?—A. Your Honor, I—

Q. He is cured?—A. I think he is much better. I would hesitate to say that he was cured.

By Mr. SPELL:

Q. Well, Doctor, as a matter of fact, neurasthenia is quite common, isn't it?—A. Fairly so.

Q. It is commonly known to the layman as nervousness, isn't it?—A. You find many cases where the patient says it's nervousness *are* neurasthenia.

Q. Doctor, everybody at one time or another in his life has been a little neurasthenic, hasn't he?—A. I wouldn't say that.

Q. A person that complains has a little neurasthenia, doesn't he?—A. Can't make a diagnosis just from a complaint (R. 212).

Q. Persons when they are fatigued or tired may have a touch of it; is that right?—A. I wouldn't say that. You've got to give motivation for neurasthenia.

Q. Yes. It is not an unusual disability, is it?—A. No; it isn't.

Q. Many people have it, continue working, don't they?—A. Yes.

Q. Doctor, how often have you testified in these matters in this court?—A. You mean in private practice or with the Government?

Q. I mean in this court.—A. Well, I have testified frequently. At one time several years ago I had the responsibility for the appointment of guardians of all cases in this district, Washington, Maryland, West Virginia, and I testified in special cases where suits were brought against the Government.

Since being in private practice, in four years, since 1937, I can't estimate exactly, but I have been in court twelve, fifteen times, in this court, courts of these kinds.

Q. How many times have you testified for Mr. Miller here?—A. A few times.

Q. How many?—A. I don't know exactly; I guess about six or eight times in the last four years.

Q. Doctor, how much are you to get in this case?

The COURT. That is not a proper question.

Mr. DAWSON. I object to that, your Honor (R. 213).

The COURT. That is not a proper question.

Mr. SPELL. I will reframe the question, your Honor.

By Mr. SPELL:

Q. Are you on a retainer in this case?

The COURT. That is not a proper question.

Mr. SPELL. I should like to show his interest, your Honor, in the outcome of this lawsuit.

The COURT. That is all right. You may not show it that way.

Mr. SPELL. Yes.

By Mr. SPELL:

Q. Doctor, would you get a larger or smaller fee if plaintiff should win this case?

The COURT. The Court is not going to permit questions like that in this courtroom. This Court will not permit that sort of examination.

Mr. DAWSON. I will say right now that he will not.

The COURT. Why, everybody knows that the doctor is employed to testify as an expert, and he is going to be paid for it, I suppose. He should be.

The WITNESS. Already paid for it.

Mr. DAWSON. Your Honor, in view of the fact that counsel has brought this issue up——

The COURT. There is no occasion—unless there is something about the doctor's testimony, the witness' testimony, which justifies it, it is never permissible to reflect, obviously reflect, upon the character of the witness; and there has been nothing up to this time in the witness' testimony which justifies anything of the kind (R. 214).

Mr. SPELL. I should like to show, your Honor, whether he is consciously or unconsciously interested in this matter.

The COURT. The Court will not permit that sort of examination, sir. Absolutely will not permit it in this courtroom.

Mr. SPELL. Yes.

The COURT. It is contempt of court.

Mr. DAWSON. I will make a statement if Mr. Spell——

The COURT. It is not necessary.

Mr. DAWSON. Very well.

The COURT. You have just as much right to put a lawyer in every case on the stand and ask him how much fee he is

going to get or whether his fee is contingent or actual and how much the contingency is; there is no difference in the world. If you start that kind of thing, why, you couldn't run a court. In other words, he would have just as much right to put you on the stand and ask you what your salary was.

Mr. SPELL. It would be all right with me.

The COURT. It might be all right with you, but he wouldn't have a right to do it.

By Mr. SPELL:

Q. Well, Doctor, you say you treat about ten neurasthenic patients a day?—A. (The witness nodded his head.)

Q. Will you tell just how many of those patients are engaged in their business at this time of the ten you treat a day? Of course, you have to make an estimate.—A. Oh, I guess about a third (R. 215).

Q. A third of them. Yes. In other words, Doctor, light or moderate mental and physical exertion is good for this type of patient, isn't it?—A. You are going to refer to a particular patient. We must ask a question on the patient, because we have to consider all the things together.

Q. I am asking you as an expert.—A. Of this type patient? If you are speaking of Mr. Cox——

Q. No; I am asking you as an expert, Doctor.—A. I would say light work, a certain amount of it, may be helpful to him, but I think he would have to be very careful.

Q. Well, I am asking you as an expert; generally isn't that true?—A. Patients equivalent in disability to this case, a certain amount of light work would perhaps be advantageous. They would have to be very careful.

Mr. SPELL. That will be all, your Honor.

Mr. DAWSON. I just want to ask him four questions, your Honor.

Redirect examination by Mr. DAWSON:

Q. Now, there has been some testimony in this case that the plaintiff, Mr. Cox, did a little supervising of some painting and papering work, Doctor. Would that work that he did

have a tendency to keep his mind off his disabilities?—A. Yes (R. 216).

Q. And would it, in your opinion, keep him, from the type of disability you found, from going absolutely insane?

Mr. SPELL. I object to that, your Honor. That calls for speculation of the wildest nature.

Mr. DAWSON. I will withdraw it.

The COURT. The Court thinks that you should withdraw it.

By Mr. DAWSON:

Q. Doctor, how long were you engaged by the Government in making examinations for the District of Columbia?—

A. I was engaged from 1921 until 1937, January 4.

Q. Can you estimate how many men you examined?—A. I tried to estimate that one time; I estimated about twelve to fourteen thousand.

Q. And how many cases have you been called in to testify?—A. In court?

Q. Yes.—A. I couldn't say.

Q. Out of that 12,000?—A. Of course, I was in charge, as I say, of the appointment of guardians in other suits in court for the Washington regional office, responsible for that for a period of several years. I went to court on an average of ten, twelve times a year, I suppose; maybe more.

Q. Was that for the Government, Doctor?—A. For the Government.

Q. And you have appeared more times for the Government than you have for private? (R. 217.)—A. More times, yes (R. 218).

* * * * *

JOHN HENRY PFLEIGER was called as a witness for and on behalf of the plaintiff, and, having been first duly sworn, was examined and testified as follows:

Direct examination by Mr. DAWSON:

Q. State your full name, Mr. Pfeifer.—A. John Henry Pfeifer.

Q. What is your business or occupation?—A. I used to be a butcher.

Q. How long have you been engaged in that occupation?—
A. About 30 years.

Q. Do you know the plaintiff in this case, Mr. Cox?—A.
Yes, sir.

Q. How long have you known him?—A. I guess about 15
years, 15 or 17 years—18, longer than that. I don't remember
the exact number of years.

Q. Were you at one time engaged in business in the City
of Washington?—A. Yes, sir.

Q. Where was your place of business located?—A. The
last place I had was 3494 M Street.

Q. How long did you operate that place? (R. 219.)—A.
Five years.

Q. About what period of time, if you remember?—A. Five
years.

Q. I know, but what I mean is what date? Between what
dates?—A. What dates?

Q. Yes.—A. I went in February 1930, and closed and sold
out in July 1935.

Q. Did you have a place in Washington prior to that
time?—A. Oh, yes; several places.

Q. Where was the place you owned just prior to this last
place?—A. 3299 M Street.

Q. How long were you located there?—A. About ten years.

Q. What kind of place did you operate?—A. Meats and
groceries and vegetables.

Q. During that time did you become acquainted with Mr.
Cox?—A. Yes; that is where I first met Mr. Cox was in this
3299 M Street.

Q. That, you say, was about 15 years ago?—A. Eighteen
years ago.

Q. Do you recall anything about his physical condition at
that time?—A. Well, yes; when I first got acquainted with
him he was practically speechless. He couldn't understand.
When he (R. 220) came to the store and asked for things
you couldn't understand what he was saying.

Q. Did there come a time when you became better ac-
quainted with him?—A. Oh, yes.

Q. Did Mr. Cox ever do any errands for you or anything like that or was he ever employed by you?—A. At that time?

Q. Yes.—A. Not at that time.

Q. Did there come a time later on when he did do some work for you?—A. 1930, when I opened this last place that I had. During the time that I first met him up until that time we were very good friends and he used to visit my house and I visited his house. I knew he wasn't working and when I opened this store I asked him if he would help me get the store ready and he did and after that I would ask him to go to the bank for me and occasionally he would work at the store when I had to go somewhere.

Q. How many people did you have employed in your store at that time?—A. At that time, five.

Q. Five people employed in the last store?—A. Yes, sir.

Q. Just what did Mr. Cox do at that time in that store?—A. Well, he waited on the trade. He would help clean chickens and go to the bank for me on Mondays. Monday mornings I used to ask him to go to the bank for me (R. 221).

Q. Did you have occasion over that period of time to observe his physical condition?—A. Yes, sir.

Q. I wish you would just tell in your own language just what you noticed.—A. Well, sometimes when we were very busy he would have a kind of spell. I don't know, sometimes he would vomit, spit up and then he would become white in the face and kind of nervous. On one occasion we sent him home on a truck. It was one of the truck drivers that thought something might happen to him and we sent him home. After that he would be all right again for a while and he would become nervous, and I don't know, he seemed to have a kind of quick temper. He used to get little spells and get in the back room and when he got all right he would come out and wait on store trade again for a while.

The reason I used to give Mr. Cox—in fact, I lived so far from the store and he lived just between my house and the store and I gave him the key to the store and when a snow storm came or I was sick I would call him up and get him

to open the store until I could get there or until somebody took care of it for me. That is how I became to get so well acquainted with him.

Q. Well, during the time he was in your place, did you pay him any wages?—A. Well, I don't know whether you considered it wages or not. I gave him things to take home, merchandise. Well, he worked Fridays and Saturdays, and I would give him five dollars for the work.

Q. In merchandise?—A. Or money. It was five dollars sometimes. Sometimes (R. 222) his merchandise would come to more than five dollars and he would pay me the difference out of his pocket.

Q. Didn't he do any physical work around the place there?—A. No, we had a man to fix the window and bring the meat in from the truck. He never done any hard work around the store for me.

Q. You say you have known him for a period of 18 years?—A. Yes, I would say, I think it was 1922 when I opened that store in Georgetown. That is where I first got acquainted with him.

By the COURT:

Q. He helped you in 1930 to 1935?—A. Yes, when I first became acquainted with him he was a customer. The old gentleman clerk I had used to wait on him.

Q. You say you visited in his home in 1930 to 1935?—A. Yes, sir.

Q. And prior to that also?—A. Yes, sir.

Q. Did you ever hear of him being employed anywhere?—A. Employed anywhere?

Q. Yes.—A. No, when I first knew him he had a truck he used to go around with. I don't know what he used it for. I know he had a truck when I first knew him.

Mr. DAWSON. That is all. I think you may cross-examine him. Just one more question, please.

By Mr. DAWSON:

Q. You were subpoenaed here by the Government? (R. 223)—A. Yes, sir.

Cross-examination by Mr. SPELL:

Q. Mr. Pfeiger, you say you opened a new store at 3299 M Street in November 1930?—A. No, sir, I didn't say that, 1932—yes, that is right, 3299. The other store was 3294.

Q. When you opened up that store, Mr. Cox helped you get it straight?—A. Yes.

Q. What did he do around there?—A. Why, he took care of the store while I went down town and buy material, paint, and lumber, and oil cloth and things like that that I needed around the store and paid for things that I had coming in there at that time.

Q. Did he do any clerking for you?—A. Well, I wasn't opened then.

Q. Did he do any sweeping?—A. No.

Q. As a result of his work with you in getting ready to open your store, did you give him employment on Friday and Saturday thereafter?—A. Yes, sir.

Q. How long did that employment continue?—A. I continued until I closed the store.

Q. That was in July 1935?—A. Yes, sir.

Q. What time would Mr. Cox usually come in the morning? (R. 224).—A. Well, sometimes I would call him to open up the store at five o'clock in the morning. Sometimes he would come at eleven o'clock in the day.

Q. How long would he stay on the job?—A. Well, sometimes it was two hours; he has been there as much as six hours. Saturdays he used to come in the morning and open up for me and then he would go home and come back and help me close.

Q. What time did you close?—A. Twelve o'clock at night.

Q. He was employed as what is known as an extra help, wasn't he?—A. No, well; I don't know whether you call it extra help, but I suppose you would.

Q. He was employed to take care of the week-end rushes, wasn't he?—A. Well, I suppose; yes.

Q. Did he do any clerking?—A. Some; yes.

Q. Did he wash any windows?—A. No.

Q. Did he sweep any floors?—A. No.

Q. Did he pick any chickens?—A. No; he wouldn't even clean one.

Q. Did he take any money to the bank for you?—A. Yes, sir; every Monday morning.

Q. Did he clerk for you?—A. Occasionally; yes, sir (R. 225).

Q. How much did you pay him for this week-end service, Friday and Saturday?—A. Five dollars, but I had to figure his service was worth to me at that time around about five dollars. He used—I really never gave him five dollars. He always got it in merchandise. Sometimes he would buy more merchandise than what I was giving him.

Q. In other words, you would pay him around five dollars and give him groceries at cost?—A. Yes; that is about the way it was. I never charged him as much for his things as he took home as I would for the regular customers. A lot of things I gave him that we couldn't sell.

Q. He performed the work that was necessary for you to have done?—A. Yes.

Q. You had to have someone to do that work?—A. Yes.

Q. And he did it satisfactorily, didn't he?—A. Yes, sir.

Q. The reason you didn't employ him after July 1935 was the fact that you went out of business?—A. Yes.

Q. When he worked for you he appeared to be a healthy man?—A. Yes, sir.

Mr. SPELL. That is all.

Mr. DAWSON. Just a minute, Mr. Pfeifer.

By Mr. DAWSON (R. 226):

Q. You and Mr. Cox are very good friends?—A. Yes, sir.

Q. Is that how you happened to give him the job?—A. Yes, sir.

* * * * *

Dr. JAMES JOSEPH WHISMAN was called as a witness for and on behalf of the plaintiff and, having been first duly sworn, was examined and testified as follows:

Direct examination by Mr. DAWSON:

Q. What is your full name, Doctor?—A. James Joseph Whisman.

Q. What is your business or occupation?—A. General practice of medicine.

Q. What school are you a graduate from?—A. University of Cincinnati.

Q. Have you engaged in the practice of your profession since the day of your graduation?—A. Yes, sir.

Q. What experience have you had?—A. Well, I was junior intern for two years in St. Francis (R. 227) Hospital. I was at the Good Samaritan Hospital in Cincinnati. I was student for five years at St. Elizabeths Hospital of this city, and interned in Gallinger Hospital.

Q. Are you connected with any company in the capacity of Medical Director?

The COURT. Will you please speak louder?

The WITNESS. Yes; I am a Medical Director for the Providence Life Insurance Company.

By Mr. DAWSON:

Q. Doctor, do you know the plaintiff in this case?—A. Yes; I do.

Q. Did you ever have occasion to examine him in your professional capacity?—A. Yes; I did.

Q. When and where did you make your examination?—A. I don't recall the exact date. I first saw him in June at my office at 2400 Thirty-ninth Street Northwest.

Q. In Washington?—A. Yes.

Q. Will you tell the Court and jury in your own language just what you found upon your examination, what your physical findings were upon that examination?—A. Well, I don't recall. I didn't bring the record down here as to the facts, but at that time, as I recall, he had very high blood pressure; his heart was enlarged, dilated; he had what we term a general conjunctive heart failure.

By the COURT:

Q. What is that?—A. His blood pressure was over 200. I think it was between 210 and 220, if I remember correctly. His ankles were very swollen. He had congestion in his chest, and he was suffering from a great deal of pain and a great many of minor complaints.

By Mr. DAWSON:

Q. Just explain that examination. Did you make a diagnosis?—A. Yes.

Q. Based on your physical findings alone?—A. Yes; based on my physical findings.

Q. What was that diagnosis for the injury?—A. He was suffering, in my opinion, with cardiac vascular renal disease, hypertension, and decompensation.

Q. By decompensation, what do you mean?—A. By that I mean that the heart is failing or was failing to carry on the load necessary for him to continue any activity at all.

Q. Did you make a chest examination of him also?—A. Yes; at that time.

Q. Did you make any findings on his chest?—A. He had quite a bit of moisture in both lungs at that time.

Q. What is that indicative of?—A. Congestion.

Q. Is that indicative of anything else?—A. Well, it is very difficult to say under such conditions what else it might be indicative of.

Q. Here are numerous reports of physical examinations made by medical doctors employed by the United States and also (R. 229) by the Public Health Service, some of which show that this man had had at one time an active condition of tuberculosis. Did you make any positive finding on that first examination that would indicate the existence of any such condition?—A. No; I don't recall that that impressed me at all on examination.

Q. Did you examine him to see whether or not his tuberculosis was arrested if any?—A. Only by physical examination. I didn't have any X-ray work done on him.

Q. Doctor, how would the condition which you found in your examination in 1940 affect this man's ability to work?—A. Why, I considered him to be——

Mr. SPELL. I object to that unless he makes the question a little clearer. What kind of work it is, whether it is light work, light physical work, or heavy work.

By Mr. DAWSON:

Q. Well, take it as a manual laborer?—A. Well, I advised Mr. Cox to go home and go to bed and stay in bed.

Q. Why?—A. His condition is very serious. It is very serious now. He should be home in bed now.

Mr. DAWSON. That is all.

Cross-examination by Mr. SPELL:

Q. Doctor, you examined the plaintiff, Mr. Cox, only once, haven't you?—A. No, I have seen him several times. He has been in my (R. 230) office for treatment regularly since I first saw him.

Q. You first saw him in June 1940?—A. Yes.

Q. How many times have you seen him since?—A. Well, I saw him several times following that in June, and then at intervals from a week to two weeks thereafter. I don't think he has gone more than two weeks that I haven't seen him since that time.

Q. Will you please state the reason for the examination you gave Mr. Cox?—A. Well, he complained to me. I met Mr. Cox at a place where I deal, and he complained of feeling very badly, and he asked me what I could do for him. I told him to come to see me in my office, which he did, and since then he has been a patient of mine.

Q. Where is your office?—A. I have an office at 1020 Nineteenth Street, Northwest. At that time I was practicing at my home. Now, I am at 2400 Thirty-ninth Street, Northwest.

Q. When did you know that you were to testify in this suit, Doctor?—A. It has been some time ago. I don't recall just exactly when.

Q. At the time you made the examination of Mr. Cox, did you know or did you have any reason to believe that you would be called to testify in this case?—A. He said something to me at that time about his being disabled and wanted to know my opinion, as I recall, but I don't think there was any question about my testifying at the (R. 231) time.

Q. Did he tell you he had a suit filed against the Government to collect his insurance?—A. He didn't say at that time. I don't believe so.

Q. You wouldn't say definitely that he didn't?—A. No; I don't recall definitely, because it was about that time, or shortly after that time that something was said. I wouldn't say under oath that he absolutely didn't or did. There was some conversation at that time as to his being disabled and having been disabled for a long time, but I don't recall, because it seems to me that it was after I saw him that I was asked to communicate with his attorney.

Q. How soon after do you recall definitely that you were asked to communicate with his attorney?—A. I don't recall. It may have been a week or two weeks.

Q. A short time thereafter?—A. Yes; it was a comparatively short time.

Q. Will you please state the diagnosis you made on the occasion when you made the examination of Mr. Cox in June 1940?—A. Well, my diagnosis is a working diagnosis for my convenience. It is best stated as being a cardiac vascular renal condition with hypertension and congestion.

Q. Just explain in simple language what you mean by cardiac vascular renal disease.—A. Cardiac vascular renal disease is a condition wherein the heart and the blood vessels and the kidneys are affected; where there is failure of the heart and blood vessels and the (R. 232) kidneys to function. That is what we term general cardiac vascular renal disease. The finding may be heart and kidney and blood vessels, but we all consider that to be a part of one general picture.

Q. Is that an organic condition?—A. Yes; that is an organic condition.

Q. How did you come to this conclusion? What means did you use to make your diagnosis?—A. Well, the history and physical findings are sufficient. Certainly, in an advanced case it is sufficient to establish a diagnosis.

Q. Did you rely on the history?—A. Yes, I rely on my patient's history.

Q. Well, what physical finding did you go through in order to arrive at the conclusion that you did?—A. Well, he has an enlarged heart, and his blood pressure is elevated.

Q. Just a minute. How much enlarged is his heart?—A. Is it now or at that time?

Q. At the time you examined him in June when you made this diagnosis.—A. Well, as I recall, his heart was enlarged to almost his anterior axillary line.

Q. How much beyond normal is that?—A. That is quite a bit beyond normal. We ordinarily, roughly speaking, consider that individuals' hearts are about the size of a closed hand, of his closed hand, and that that conforms in stature with the person and gives you a rough idea of the size of their heart. The heart normally comes to about (R. 233) the mid-axillary line, the mid-clavicular line in the individual. That is the line which is drawn midway between the two ends of the collarbone which usually comes down to the externals and the anterior axillary line is the line which bounds the anterior portion of the axilla, or the armpit which goes down the side of the body. There is a difference there of about the size of the normal individual's heart; there is room enough there for that man's heart and another one to be placed in the lateral portion.

Q. In other words, his heart was just slightly enlarged?—A. No; I wouldn't consider it slightly enlarged.

Q. That is not unusual in a man of Mr. Cox's age?—A. No; as I say—for his heart to be enlarged?

Q. Yes; to the size you found his.—A. No; not the physical findings; that is quite abnormal.

Q. But that occurs frequently?—A. Not without the existence of disease.

Q. The shape of everyone's heart is not the same size, is that true?—A. The shape and size are not terms that we use.

Q. I mean the size.—A. No; as I say, we roughly figure for rough diagnostic or reporting purposes that a person's heart should be about the size of his closed hand.

Q. But it varies?—A. Yes.

Q. How high was his blood pressure?—A. As I recall, it was over 200 systolic.

Q. What should it be, for the benefit of the jury? (R. 234.)—A. His blood pressure should be between 130 and 140 at the most.

Q. For a man 49 years old?—A. Yes.

Q. That is abnormally high, is it?—A. What?

Q. The blood pressure you found?—A. Over 200.

Q. Yes?—A. That is exceedingly abnormal.

Q. That in itself does not indicate a heart condition?—A. No; that is part of a general picture.

Q. There can be steps taken to bring down the person's blood pressure?—A. Yes; that is what we do. That is what I tried to do with him.

Q. Have you been successful?—A. To some extent; yes.

Q. What other finding did you make in order to make you arrive at the conclusion which you did? You say he had an enlarged heart and high blood pressure. What else?—A. Congestion of his lungs.

Q. Does that refer to his heart condition?—A. Yes.

Q. Just how does that affect his heart?—A. Well, that congestion in the circulation is an extra load on the work that the heart must do and also on the return of the blood to the heart. Circulation, when it is interfered with, increases the work which the heart must do which (R. 235) in turn interferes again and causes the interference to be increased.

Q. That in itself doesn't mean the man has a heart disease, does it? A man who has a congestion of his lungs?—A. No; it may be from any number of things.

Q. What other finding did you make?—A. Congestion of his ankles—swelling of his ankles.

Q. That can be a symptom of many diseases?—A. Yes.

Q. It doesn't necessarily mean his heart is affected.—A. No.

Q. What other finding did you make, Doctor?—A. He also had an enlarged liver, as I recall now.

Q. Explain the connection.—A. That is all part of the circulatory deficiency. That is part of the failing circulation—

of the failing heart in which the blood is not forced through the blood vessel or it cannot go through the blood vessel.

Q. Did you determine the size of his heart and his liver by percussion?—A. Yes.

Q. All right, what else?—A. I believe that is all I recall now, except his eye ground at that time.

Q. What did you find?—A. That he had retinous sclerosis.

Q. What is that in everyday language?—A. That is a condition where there is various diseases of the blood vessels of the retinous. Any medical student who (R. 236) makes a diagnosis would find the same findings. There is no difficulty about it.

Mr. SPELL. I object to it.

The COURT. Just a minute. Wait until the doctor finishes.

The WITNESS. In coming to the conclusion, it is such a well-defined picture with shortness of breath, swelling of the ankles, and enlargement of the liver, and elevation of the blood pressure; these help me to come to my conclusion. That is all part of the general picture. It is not a difficult diagnosis. It is not one that ordinarily calls for a great deal of technical or laboratory work to confirm it.

The COURT. What is the objection?

Mr. SPELL. I object to the part of what an ordinary medical student would find.

The COURT. The objection is overruled.

By Mr. SPELL:

Q. Doctor, and the condition you found in his eye; that in itself wouldn't indicate a heart condition, would it?—A. No; not any one of these conditions in themselves. You couldn't pick upon any particular finding and symptom and say that that is sufficient to make a diagnosis. I made a diagnosis of his condition upon what he told me, how he felt, and what I found.

Q. You rely upon the history that he tells you?—A. Yes. I mean, if he says he was short of breath, I am bound naturally to consider that and give some weight to that.

Q. What other finding did you make in each of your diagnoses?—A. As I recall, those are all that I found at that time (R. 237).

Q. You don't recall any other?—A. No; I don't believe so.

Q. How long did you have him under observation before you made your diagnosis in June 1940?—A. Well, it didn't take me long to make the diagnosis.

Q. How many minutes did it take you to reach the diagnosis you made?—A. Well, I don't recall how many minutes. He sat and talked to me for a while.

Q. For an hour?—A. Yes; I would say in the course of an hour.

Q. Did you make an X-ray of his liver and his heart?—A. No; I had no X-ray work performed.

Q. And that would have been a help, wouldn't it?—A. That would have been a help? I don't think so.

Q. You do that, don't you, in making diagnoses?—A. Well, it depends on what the diagnosis is for. In a cardiac condition, unless we have some reason to think that there is something blind, we don't have an X-ray taken, for the same particular thing—

The COURT. Do you mean something that is obscure?

The WITNESS. Yes; something that is obscure that we can't determine by other means.

By Mr. SPELL:

Q. Well, Doctor, did you make an electrocardiogram of the man's heart?—A. No; I didn't.

Q. That would be a big help, wouldn't it?—A. That would be of some help; yes (R. 238).

Q. Do you usually make those?—A. No; not on every patient.

Q. That is about the best method to determine whether a man has a heart condition?—A. No; I disagree.

Q. Do you know a better method?—A. A better method?

Q. Yes.—A. Of determining what is wrong with a man's heart by an electrocardiogram?

Q. Yes.—A. I think how the man acts and responses to strain.

Q. I mean tests.—A. That is different. I think functional tests are a much better indication of what condition the man is in than any laboratory procedure.

Q. You do like to have an electrocardiogram performed?—
A. Yes; I do like to have an electrocardiogram performed, but you can't put a patient through all these things when you don't feel it is going to be of any help.

Q. You don't think it was necessary in this case?—A. No; I think he was responding fairly well to medication. I didn't see any reason for my putting him to the expense of all these laboratory procedures.

Q. What is cardiac vascular renal disease? Is that a strain?—A. Cardiac vascular renal disease is usually considered to be a condition which is in its inception, with disease of the kidney, with changes in the vascular coats in the vessels (R. 239) which usually become decimated and which in turn has its effect upon the cardiac muscular structure.

Q. Will you please repeat that answer?—A. Well, it is a little difficult to picture the changes that go on. No textbook will tell you positively that such cause or the result of any particular condition. However, we do feel that the changes which occur in the kidneys are the primary changes in most of these conditions.

Q. All right. What is your object in treating him? Do you think his condition will continue?—A. I don't think he is going to live if he isn't careful. He is suffering with congestion and he can hardly breathe at times. He made the trip here against my orders.

Q. Have you reduced his blood pressure?—A. It is against my advice that he is here today.

Q. Can you give us any estimate of when this condition began?—A. That is very difficult to say. You see now the end result of Mr. Cox's continual injury of the heart muscles, kidneys, and blood vessels.

Q. If I told you that Mr. Cox has been examined as recently as 1936, and found that nothing was the matter with his heart, would you say the condition must have—

The Court. That is not a proper question. He hasn't anything to do with some other doctor's examination. This cross-examination has proceeded so long. The Court must take some steps to stop the continuous repetitions.

Mr. SPELL. I have a few more questions, if your Honor please. I want to ask the doctor if he can tell us to any de- (R. 240) gree of certainty when this condition had its inception.

The WITNESS. It probably had its inception when he had the first disease; the first infection that he had a cold or sinus; the first time that he had suffered digestive disturbances; the first time that he began to liberate toxins and absorb them into his system.

Q. You don't know when that was?—A. I don't believe anyone can tell you that.

Q. That is the ultimate—A. It is the end result of continuous injury to the heart, kidney, and blood vessels.

Mr. SPELL. That is all. Oh, one minute, please.

By Mr. SPELL:

Q. What is rhinitis?—A. That is an infection of the nose.

Q. Is that a cold condition?—A. That may be a cold or it may be a more severe inflammation (R. 241).

* * * * *

Mr. DAWSON. That is the plaintiff's case, your Honor.

EVIDENCE ON BEHALF OF THE UNITED STATES

Mrs. DOROTHY STEWART was called as a witness for and on behalf of the United States, and, having been first duly sworn, was examined and testified as follows:

Direct examination by Mr. SPELL:

Q. Will you state your name, please?—A. Dorothy Stewart.

Q. Where do you reside, Mrs. Stewart?—A. Arlington.

Q. Do you know the plaintiff, Mr. Cox?—A. I've met him.

Q. Mr. Cox ever do any work for you?—A. He did.

Q. What work was that, Mrs. Stewart?—A. Painting and paperhanging.

Q. Was that on your residence?—A. Yes.

Q. When did he do this work, Mrs. Stewart?—A. In June.

Q. 1940?—A. 1940; yes.

Q. Yes; what was the size of the job?—A. Well, I couldn't tell you that.

Q. I mean how many rooms do you have?—A. Oh, six-room house.

Q. Did he paint it inside and out? (R. 252.)—A. Yes.

Q. Paper it, too?—A. Yes.

Q. How much did you pay him, Mrs. Stewart?—A. I didn't settle with him at all. My husband did that.

Q. Do you know how much he paid him?—A. Well, it was in the neighborhood of \$250.

Q. Yes; was Mr. Cox responsible to you for the job?—A. Yes; he was.

Q. Were you satisfied with the work?—A. Yes.

Q. How long did it take him to do it, do the work?—A. Around two weeks.

Mr. SPELL. That will be all. Your witness.

Mr. DAWSON. Just a minute, please, Mrs. Stewart.

Cross-examination by Mr. DAWSON:

Q. Mr. Cox do the work?—A. Did Mr. Cox do the work?

Q. Yes.—A. Why, I didn't see him do any of the work.

Q. He wasn't doing any work?—A. No; I did not.

Q. How many men did we have there?—A. Well, now, I couldn't say that because I wasn't living there at the time.

Q. Oh, you were not there? You were not living at the house? (R. 253.)—A. I wasn't; no.

Q. You actually didn't see any of the work done there; is that right?—A. Well, no; I didn't; because it was always late in the afternoon when I arrived there, around 5 o'clock before I ever got there.

Q. You actually don't know who did the work there, then, do you?—A. Well, no; I couldn't say he did that work, but he was there, took the contract.

* * * * *

VENNER E. SPIERS, called as a witness for the United States produced records of payments made to the plaintiff by the Post Office Department for personal services. These records showed payments as follows (R. 254):

January 9, 10, and 11, 1929. \$15.24 salary, \$3.24 equipment allowance. Equipment allowance is the amount that the Government allows for vehicle hire.

February 1, 1929. \$5.62 salary; \$1.08 equipment.

March 12, 1929. \$5.08 salary; \$1.08 equipment (R. 256).

March 22 and 23, 1929. \$10.16 salary; \$2.16 equipment.

April 1, 2, 3, 4, 5, 6, 8, and 9, 1929. Salary, \$42.00; equipment, \$8.64.

May 16, 17, and 20, 1929. \$15.24 salary; \$3.24 equipment.

June 3, 1929. Salary, \$5.25; \$1.08 equipment.

July 19, 1929. Salary, \$5.08; \$1.08 equipment.

July 25 to 31, 1929. \$30.48 salary; \$6.48 equipment; \$5.08 salary; \$1.06 equipment.

August 1 to 15, 1929. Salary, \$50.81; \$10.80 equipment (R. 257).

August 16 to 31, 1929. Salary, \$55.85; \$11.88 equipment.

September 3 to 6, 12, 13, 1929. Salary, \$31.50; \$6.48 equipment.

October 5 and 28, 1929. Salary, \$10.16; \$2.16 equipment.

January 27 and 28, 1930. Salary, \$10.32; \$2.24 equipment.

May 2 and 5, 1930. Salary, \$10.32; \$2.24 equipment.

May 28 to 31, 1930. Salary, \$20.65; \$3.36 equipment.

July 17, 18, and 19, 1930. Salary, \$15.48; \$3.36 equipment.

October 2, 3, and 4, 1930. Salary, \$15.48; \$3.36 equipment.

November 1 and 3, 1930. Salary, \$10.67; \$2.24 equipment.

November 22 and 29, 1930. Salary, \$5.33; \$1.12 equipment.

December 1, 1930. Salary, \$5.16; \$1.12 equipment (R. 258).

January 1, 3, and 6, 1931. Salary, \$15.48; \$3.36 equipment.

January 23 and 24, 1931. Salary, \$10.32; \$2.24 equipment.

February 20, 1931. Salary, \$5.14; 96¢ equipment.

March 29, 1931. Salary, \$4.65; 96¢ equipment.

April 24, 1931. Salary, \$5.08; \$1.00 equipment.

May 25, 1931. Salary, \$5.00; \$1.04 equipment.

June 10 and 29, 1931. Salary, \$10.34; \$2.08 equipment.

July 17 and 18, 1931. Salary, \$10.00; \$2.08 equipment.

August 26 and 27, 1931. Salary, \$10.00; \$2.08 equipment.

February 24 and 25, 1932. Salary, \$10.69; \$2.08 equipment.

March 2, 3, 9 and 10, 1932. Salary, \$20.00; \$4.16 equipment (R. 259).

March 17, 1932. Salary, \$5.00; \$1.04 equipment.

April 25 and 26, 1932. Salary, \$10.33; \$2.08 equipment.

June 6 to 9, 1932. Salary, \$20.67; \$4.16 equipment.

June 20 to 23, 1932. Salary, \$25.83; \$2.50 equipment.

July 22 and 23, 1932. Salary, \$9.17; \$1.82 equipment.

August 8 and 9, 1932. Salary, \$9.17; \$1.82 equipment.

October 21, 1932. Salary, \$4.58; 91¢ equipment.

January 19 and 20, 1933. Salary, \$9.17; \$1.82 equipment.

February 9 and 10, 1933. Salary, \$10.15; \$1.82 equipment.

March 22 to 24, 1933. Salary, \$13.75; \$2.73 equipment.

April 4 and 5, 1933. Salary, \$8.78; \$1.77 equipment.

April 11 and 12, 1933. Salary, \$8.78; \$1.77 equipment.

April 18 and 19, 1933. Salary, \$8.78; \$1.77 equipment.

April 25 and 26, 1933. Salary, \$8.78; \$1.77 equipment.

May 3 and 4, 1933. Salary, \$8.50; \$1.77 equipment (R. 260).

May 23 and 24, 1933. Salary, \$8.50; \$1.77 equipment.

June 2 and 3, 1933. Salary, \$8.78; \$1.77 equipment.

June 7, 1933. Salary, \$4.39; 88¢ equipment.

June 1933. Salary, \$8.78; \$1.77 equipment.

August 3 and 4, 1933. Salary, \$8.50; 52¢ equipment.

August 9 and 19, 1933. Salary, \$8.50; 52¢ equipment.

August 16 and 17, 1933. Salary, \$8.50; 52¢ equipment.

August 24 and 25, 1933. Salary, \$8.50; 52¢ equipment.

September 7 and 8, 1933. Salary, \$8.78; 52¢ equipment.

September 11, 1933. Salary, \$4.39; 26¢ equipment.

September 25 and 26, 1933. Salary, \$8.78; 52¢ equipment (R. 261).

Mr. SPELL. If your Honor please, when we adjourned last evening, by agreement between counsel for the defendant and the plaintiff we will summarize the remaining pay roll records that weren't read from by Mr. Spiers. I will summarize these by months in order that the entire picture may be gathered by the jury.

The COURT. All right, sir.

Mr. SPELL. In October 1933 Mr. Cox worked four days and received two checks, \$9.02 each. In November 1933 Mr. Cox worked three days and received one check, \$15.52.

In March 1934 Mr. Cox worked for two days and received one check, \$9.02.

In April 1935 Mr. Cox worked two days.

The COURT. Is that 1935 or 1934?

Mr. SPELL. I beg your pardon; 1934. Mr. Cox received one check, \$9.82.

In June 1934 Mr. Cox worked five days and received two checks, one for \$14.73 and one for \$9.82.

In July of the same year Mr. Cox worked nine days and received one check of \$47.56.

In Aug. 1934 Mr. Cox worked five days and received two checks, one for \$10.56 and one for \$15.85.

In September 1934 Mr. Cox worked two days and received one check for \$10.83.

In October 1934 Mr. Cox worked one day and received one check for \$5.28.

In December 1934 he worked two days and received one check, \$10.57 (R. 265).

During the month of February 1935 Mr. Cox worked two days and received one check, \$11.42.

In May of that year he worked four days and received two checks in the amount of \$10.99 each. In September 1935 he worked seven days and received two checks, one in the amount of \$35.14 and one in the amount of \$14.06.

In October 1935 he worked one day and received one check of \$6.86.

In December 1935 Mr. Cox worked three days and received one check, \$20.57.

In January 1936 Mr. Cox worked two days and received one check, \$13.72.

In February 1936 Mr. Cox worked three days and received two checks, one for \$14.42 and one for \$7.21.

In March 1936 Mr. Cox worked three days and received one check for \$20.57.

In April 1936 Mr. Cox worked two days and received one check for \$14.06.

In May 1936 Mr. Cox worked six days and received two checks, one in the amount of \$20.57 and the other in the amount of \$20.57.

In June 1936 Mr. Cox worked one day and received one check in the amount of \$7.03.

This completes the reading from the record—the pay-roll record—of the employment of Mr. Cox as a substitute mail carrier at Ballston, Virginia, and marked "Government's Exhibits 5-A through 5-H," inclusive.

Now, we have records to show where Mr. Cox's employment as a temporary employee in the Ballston post office, where he (R. 266) worked during the Christmas rushes. These records have been marked "Government Exhibit 6." They begin in the year 1927. It shows that in January 1927 Mr. Cox was paid for services the amount of \$36.96. For six days' work in December 1928 Mr. Cox was paid \$30. For six days' work performed in December of 1929 Mr. Cox was paid \$37.69. For six days' work during December 1930 Mr. Cox was paid \$30. For work performed during the month of December 1931 Mr. Cox was paid \$30. For work performed by Mr. Cox on December 19 to December 27, 1932, Mr. Cox was paid the sum of \$27.59. For work performed by Mr. Cox during the month of December 1933 he was paid the sum of \$30.18. For work performed by Mr. Cox on December 17 to 26, 1934, Mr. Cox was paid the sum of \$28.50. For work performed by Mr. Cox on December 19, 20, 21, 23, 24, and 26, 1935, Mr. Cox was paid the sum of \$30 (R. 267).

* * * * *

GOVERNMENT'S EXHIBIT No. 1

"Application for a Permit to Operate a Motor Vehicle in the District of Columbia."

* * * * *

"1. Name of Applicant: Harry Clinton Cox.

"2. Residence: Falls Church.

* * * * *

"Date of Birth: June 24, 1891.

"Age: 35.

"Nationality: American.

"Race: White.

"Weight: 170.

"Height: 6 ft.

* * * * *

"7. Has your right to operate in the D. C. or elsewhere ever been suspended or revoked? No.

* * * * *

"Date: December 1, 1926."

* * * * *

"9. Have you good natural eyesight? Yes (R. 268).

* * * *

"11. Have you ever had epileptic attacks? No.

"12. Have you any other physical defects? No.

"14. Signature of applicant: H. C. Cox.

"Subscribed and sworn to before me December 3, 1926."

The notary public's signature is illegible.

"Examiner's report:

"Examination given and application approved by ——"

This is illegible, but the name seems to be signed by John Kufu, Examiner (R. 269).

* * * *

GOVERNMENT'S EXHIBIT No. 2

Application for License to Operate Automobile.

"Name: Harry C. Cox. Post Office address: Ballston.

* * * *

"Race: White; Sex: Male; Height: 6; Weight: 200; Year born: 1891. * * * Occupation: R. F. D. carrier."

* * * *

"1. Have you driven a motor vehicle in Virginia a distance of 500 miles? Yes.

"2. How long have you driven a motor vehicle: 18 years.

"3. Are you familiar with motor vehicle laws and highway warnings and direction signs of this state? Yes (R. 270).

* * * *

"6. Is your eyesight impaired in any way? No.

"7. Is your hearing impaired in any way? No.

"8. Do you have any physical defect that might affect your operation of a motor vehicle? * * *

"9. Have you ever had an operator's license? District of Columbia.

"10. Has your license ever been suspended or revoked? No.

"11. Do you know that false statements herein constitute perjury or grounds for revocation of your license? Yes.

"Applicant's signature: Harry C. Cox.

"Comes now the above for this license, being duly sworn, deposes and says that the statements and answers set forth in the foregoing are true and correct.

"State of Virginia, County of Arlington.

"Subscribed and sworn to before me this 11th day of July 1932.

"My term expires December 31, 1935. R. E. Prennington, Deputy Clerk, Circuit Court, Arlington County, Virginia" (R. 271). * * *

* * * * *

GOVERNMENT EXHIBIT 3

"Application for renewal of operator's license, Commonwealth of Virginia." * * *

* * * * *

"Name: Harry C. Cox.

"Address: Ballston, Virginia.

* * * * *

"Occupation: Paper Hanger.

* * * * *

"I hereby make application for renewal of operator's license and aver the following answers are true and correct:

"Have you any mental or physical disability which (R. 272) affects your operation of a motor vehicle? No.

* * * * *

"Applicant's usual signature: Harry C. Cox.

"The above applicant being duly sworn makes oath the statements above are true and correct.

"State of Virginia, County of Arlington.

"Subscribed and sworn to before me, this 4th day of June 1934.

"My commission expires April 20, 1938."

This looks like "Joseph Reible, Notary Public," and the seal is affixed to the application and the application bears the stamp "Approved June 9, 1934" (R. 273).

* * * * *

GOVERNMENT'S EXHIBIT No. 4

"Operator's License Application (this application not to be used by chauffeurs).

"1. Issued July 1, 1939. Expires June 30, 1942. License No. 408717.

"2. Name (print): Harry C. Cox.

"3. Street address or R. F. D. No.: 911 North Greenbriar.

"4. City or Post Office: Arlington. State: Virginia.

"5. Signature of licensee: Harry C. Cox.

* * * * *

"8. Is your vision impaired in any way? No.

* * * * *

"9. Have you any physical or mental disability? No.
* * * (R. 274).

* * * * *

"12. Has your license to drive ever been suspended or revoked in this or any other state? No.

* * * * *

"Applicant's signature: Harry C. Cox.

"State of Virginia, County of Arlington.

"Subscribed and sworn to before me this 7th day of June, 1939.

"My commission expires April 20, 1942.

"Joseph Reible, Notary Public."

Mr. DAWSON. In your summation, Mr. Spell, you don't claim that that was a physical and mental examination? You mean it was only the examination by a clerk in the office there; is that what you mean?

Mr. SPELL. Examined to see that all the answers were filled in, I assume.

Mr. DAWSON. You don't claim any medical examination?

Mr. SPELL. No; of course not.

* * * * *

(R. 275.)

ERNEST LUNSFORD was called as a witness for and on behalf of the United States and, having been first duly sworn, was examined and testified as follows:

Direct examination by Mr. SPELL:

Q. Where do you live, Mr. Lunsford?—A. Fairfax.

Q. What business are you engaged in?—A. I am a stone mason and building contractor.

Q. How long have you been engaged in that business?—A. About seven years.

Q. Do you know the plaintiff, Mr. Cox?—A. Yes, sir.

Q. Has he ever done any work for you?—A. Yes, sir.

Q. When did he first start working for you?—A. About September.

Q. What year?—A. 1940.

Q. How many jobs has he done for you?—A. Well, he had one job, and he had a man a few days on another job.

Q. Will you state where that job was?—A. It was at 2214 Key Boulevard.

Q. What did that consist of?—A. A new house.

Q. What size of house? (R. 276.)—A. It was 34 by 27.

Q. How long did he take on that job?—A. Practically eight weeks.

Q. How many men did he have working on that job, Mr. Lunsford?—A. About three.

Q. Did he supervise their work?—A. Yes, sir.

Q. How much did you pay him for that work, Mr. Lunsford?—A. I paid him \$300 for the job.

Q. Was the work satisfactory?—A. Yes, sir.

Q. What was his other job you spoke of? Where he had a man working?—A. I just had some floors to finish in a house. And some little kitchen to do. The house had been built for about a year.

Q. He had one of his men working on that?—A. Yes.

Q. Did you secure the services of this man through Mr. Cox?—A. Yes, sir.

Q. Aren't you trying to get Mr. Cox a job now?—A. Yes, I have a little job I thought I could get him.

Q. Where is the job?—A. That is at 650 Glebe Road.

Q. What is to be done there?—A. It is a little inside painting to do.

Q. Is it a restaurant? (R. 277.)—A. Yes, sir.

Q. How much will he get out of there if he gets the job?—

A. Well, I guess it amounts to around \$200.

Mr. SPELL. That is all.

Cross-examination by Mr. MILLER:

Q. This \$200 that you mentioned is what will be paid, out of which he must pay for what?—A. That is to pay for the paint and labor and all. That is all.

Q. In other words, he pays for the paint and labor?—A. Yes, sir.

Q. On this first job that you mentioned, were you there, and did you see the work being done?—A. Yes, sir; I was there every day.

Q. Did he do any work himself on the job around there?—A. No, sir.

Q. Why, if you know?—A. Well, I was—I thought maybe he was feeling bad. I always thought it looked like he was feeling bad, to me. He said he wasn't able to do much work.

Q. How long have you known him?—A. I guess about four years.

Q. During that time have you known him to do any work, personal work himself, that you recall?—A. Well, the first time I met him I think he was doing a little work. That was about four years ago.

Q. Do you have any knowledge as to whether he made any (R. 278) profit on this job here or whether he lost money?—

A. I think he lost money on this job he did for me.

Q. Why?

The COURT. I know why. Eight weeks and three men and \$300.

Mr. MILLER. That is all. I won't press that question.

By Mr. MILLER:

Q. On the other job that you mentioned, do you know whether he lost money on that?—A. No; I just paid him by the hour every day.

Q. The help are paid by the hour?—A. Yes.

Q. Do you know Mr. Cox?—A. Yes, sir.

Q. Personally?—A. Yes, sir.

Q. Does your personal friendship have anything to do with you giving him these jobs?—A. No; I thought he was just as good enough to do them as anybody else I knew of. I liked his work and all, and I never had any trouble with him.

Q. You, I believe, were called, you were away yesterday morning when you were called as a witness when the plaintiff's case was going on?—A. Yes, sir.

Redirect examination by Mr. SPELL:

Q. Mr. Lunsford, you said you didn't see Mr. Cox do any work on the job. Do you mean physical labor? (R. 279.)—A. Yes.

Q. He was supervising the work, wasn't he?—A. Yes, sir.

Q. And you held him responsible for the way the job was done, didn't you?—A. Yes, sir.

Q. And he gave you satisfactory work?—A. Yes, sir.

Q. You say you saw him do some work on one job?—A. When I first met him.

Q. I mean physical work.—A. Yes, sir.

Mr. SPELL. That is all.

Mr. MILLER. No further questions.

Mr. SPELL. I call for Mr. Grigsby.

Thereupon

HUGH A. GRIGSBY was called as a witness for and on behalf of the United States, and, having been first duly sworn, was examined and testified as follows:

Direct examination by Mr. SPELL:

Q. Will you please state your full name?—A. Hugh A. Grigsby.

Q. What business are you in?—A. Contractor.

Q. Do you build homes?—A. Yes, sir.

Q. Do you know the plaintiff, Mr. Cox? (R. 280.)—A. Yes, sir.

Q. How long have you known him?—A. I guess 12—around 12 years, I guess, maybe a little longer.

Q. Has he ever done any work for you?—A. Yes, sir.

Q. When did he first start working for you, Mr. Grigsby?—

A. It has been about—just about this time two years ago, I guess, the first job he ever done, as I can remember.

Q. Where was that job, Mr. Grigsby?—A. The job was on Utah Street.

Q. Was that a building to be papered and painted?—A. Yes, sir.

Q. How many men did he have on that job?—A. Well, I don't remember exactly whether he had two or three there.

Q. How much did you pay him for that work?—A. I think it was \$200 I paid him for the job.

Q. Did Mr. Cox supervise the work?—A. Yes, sir; he was around there every day, practically.

Q. Did you hold him responsible for the work?—A. Yes, sir.

Q. Did he do the work satisfactorily?—A. Yes, sir.

Q. What other jobs did he do for you, Mr. Grigsby?—

A. He did a job they called the Pope job. That is the name of the people, Pope, P-o-p-e, job.

Q. What did that job consist of?—A. That job was practically all painting, I think (R. 281).

Q. How big a house was it?—A. Six rooms and bath.

Q. Did he paint it inside and out?—A. Yes, sir.

Q. How many men did he have on that job?—A. Well, I don't think he had about two there.

Q. Did he supervise the work?—A. Yes; he was around there every day. He would go and come.

Q. Did you hold him responsible for the job?—A. Yes, sir.

Q. How much did you pay him for that particular job?—

A. That job ran even \$200.

Q. Did Mr. Cox solicit for this work, Mr. Grigsby?—A. Yes; he came and gave me a bid on this job and naturally—

Q. Mr. Grigsby, what other job did he do for you?—A. He had another job which was in the 400 block, I believe, 15—415, I think it was, Taylor Street, I believe. That has been about a year ago. It is hard to remember all this stuff in your mind. That was a \$200 job.

Q. How large a house was that?—A. Same size house.

Q. Did Mr. Cox supervise that?—A. Yes, sir.

Q. You held him responsible for the work?—A. Yes, sir.

Q. Was that job satisfactory?—A. Yes (R. 282).

Q. What other work did he do for you?—A. Another job he done which is pending in court now. It has never been settled. It got tangled up. It is 615 Taylor Street, and the other one is South Taylor Street. Don't get the two mixed up together.

Q. What was the contract on that house?—A. The contract price to start with was \$225 for it, but the extras ran it up to about \$300, the extra work that was done on it. Of course, that is tied up in court and nobody got the money.

Q. How many men did he have on that job, Mr. Grigsby?—A. I don't know.

Q. Did he also supervise that job?—A. Yes.

Q. Was the work satisfactory to you?—A. Well, it was. Yes; it was satisfactory to me.

Mr. SPELL. That is all.

Cross-examination by Mr. DAWSON:

Q. Did you say that you have known Mr. Cox for about 12 years?—A. Yes. Maybe a little longer.

Q. How long have you been in the contracting business?—A. I have been in the contracting business in and out. I have been contracting off and on for about 18 years.

Q. During that period of time Mr. Cox has papered and painted three houses for you, approximately three or four houses?—A. Yes (R. 283).

Q. How many houses have you built during that time?—A. Well, I don't know exactly. I never keep any track of them. Mr. Cox never came to me to do any painting until the last year or so.

Q. How many houses would you say you built in the last five years? Just estimate it roughly.—A. I built four to six a year.

Q. Four to six a year?—A. Something like that.

Q. And out of that four to six a year Mr. Cox has done four of these houses for you?—A. Four; yes.

Q. Now, were you at these places, at these houses that were being built, where the paperhanging and painting was being done?—A. Yes; I was there every day.

Q. Did you ever see Mr. Cox do any work on the jobs there?—A. No; no more than take the paint brush and maybe paint one side of a piece of trim and show the men or something like that.

Q. As a matter of fact, you have taken him home from the job several times, haven't you, Mr. Grigsby?—A. No; I don't know as I ever did.

Q. Do you recall one time when you took him home from the job when he got sick on the job?—A. I believe he had a carpenter working for him at one time who took him home. I don't think I did. There was a carpenter who took him home at one time; one of my carpenters (R. 284), but I didn't.

Q. Several times you asked him that you didn't bother taking him home.—A. I did. One job which he was suffering he said, "No," he would stay there until the men quit working.

Q. He is a man who didn't complain very much, isn't he?—A. Well, he did complain about his head a number of times. He said he suffered from his head and he had awful headaches.

Q. He got \$200 apiece for each house for the paperhanging and painting of them?—A. Yes.

Q. Was that for the inside and outside painting?—A. Yes.

Q. Do you know whether he made any money on the job?—A. Well, I couldn't exactly say whether he made or whether he lost money or not.

Mr. SPELL. He said he doesn't know. I don't think he would know. I object to that question.

The COURT. I think he said he doesn't know.

By Mr. DAWSON:

Q. You have been in the contracting business for 18 years. Do you have any opinion?—A. Not straight through.

Q. Do you have any opinion whether the man who took those jobs at \$200 apiece would make any money on them?—A. Well, I don't think he ought to lose anything on it.

Q. You haven't any idea how much he made on it?—A. No (R. 285).

Q. Would it be as much as \$20?

Mr. SPELL. He said he doesn't know. I object to that question.

The COURT. It is cross-examination. He is your witness. Proceed, gentlemen.

The WITNESS. I wouldn't know exactly, because I never figured up how long his men were there, neither what he pays for his men, and I don't know what he makes.

By Mr. DAWSON:

Q. Have you always contracted to do your painting and papering of your houses that you build?—A. Yes (R. 286).

* * * * *

WILLIAM W. McCLAINE, was called as a witness for and on behalf of the Government and, having been first duly sworn, was examined and testified as follows:

Direct examination by Mr. SPELL:

Q. Will you please state your full name?—A. William W. McClaine.

Q. Where do you live, Mr. McClaine?—A. I live in 3316 Newark Street Northwest, Washington.

Q. What is your business?—A. Real estate.

Q. How long have you been in that business, Mr. McClaine?—A. Twenty years.

Q. Is your business building houses?—A. Over in Virginia; yes.

Q. Are you acquainted with Mr. Harry C. Cox?—A. Yes.

Q. When did you become acquainted with him, Mr. McClaine? (R. 317.)—A. Well, about April 1939, I think.

Q. Has he done any painting or paperhanging work for you?—A. Yes.

Q. When did he first begin working for you?—A. The first contract I think was in April 1939.

Q. What did that consist of, Mr. McClaine?—A. Painting and papering three houses.

Q. What was the total amount of that contract?—A. \$640 plus a little extra.

Q. Did Mr. Cox contact you and endeavor to get this work?—A. My son, he dealt with my son really.

Q. Was Mr. Cox held responsible for this work?—A. As contractor—he took the contract; yes.

Q. Did he supervise the work?—A. Yes.

Q. How many men did he have on the job, these three houses?—A. Well——

Mr. DAWSON. I think there ought to be some showing here that this man was there first, before he can say how many men were on the job.

The COURT. If he doesn't know, he can't say; but if he does know, he can say.

By Mr. DAWSON:

Q. Were you there yourself?—A. Part of the time (R. 318).

By Mr. SPELL:

Q. How many men did you observe on the job when you were there?—A. I think four, including Mr. Cox part of the time. I don't think they were there all the time, according to my recollection.

Q. Did Mr. Cox do any of the actual manual labor on these three houses?—A. Yes.

Q. Did you observe him doing any papering?

The COURT. Let him state what he did.

By Mr. SPELL:

Q. I beg your pardon. What did he do?—A. He had a contract to paint and paper the houses.

Q. What did Mr. Cox do himself; any manual labor at all?—A. Painting.

Q. How long did it take him to complete this work on three houses?—A. About a month. My record might show; I don't recall.

Q. Do you have a record on that?—A. I have a record of the payments. That gives some idea of the time.

Q. Did he do any other work for you, Mr. McClaine?—A. Yes; he entered into a contract to do the painting in a new apartment building we built.

Q. What was the amount of that contract?—A. That was \$1,650. It was later reduced to \$1,450. He didn't paint cabinets. We bought them painted and reduced it to that extent (R. 319).

Q. How many men did he have on the job, Mr. McClaine?—A. Five or six, at times four.

Q. Did he supervise that work?—A. Yes.

Q. Did you hold him responsible for the work?—A. Oh, yes; as a contractor; yes.

Q. When was the work on the apartment done, Mr. McClaine?—A. December—I think it was finished in January 1940.

Q. Were all the payments on this contract made?—A. Yes.

Q. The contract was completed, in other words?—A. Yes.

Q. Do you have the records showing the payments made to Mr. Cox on the three houses and on the apartment building?—A. Yes.

Q. May I have the record, Mr. McClaine? First one question, please, sir. Have you produced these records in response to a Government subpoena?—A. Yes. This is a contract for the houses [indicating].

Mr. SPELL. I want to mark that first. At this time I offer in evidence document marked "Government Exhibit 8" for identification, which was used as a contract for papering and painting three dwelling houses.

Mr. DAWSON. I have no objection.

(Papers produced by Mr. McClaine and heretofore marked "Government Exhibit 8" for identification were thereupon received in evidence) (R. 320).

By Mr. SPELL:

Q. Will you explain that contract to the jury?—A. Well, it says:

"All exterior woodwork and metal sash to receive three coats of Benjamin Moore outside paint"—

Mr. DAWSON. I object to that. I think the contract speaks for itself.

The COURT. The jury may read it themselves.

Mr. DAWSON. There is no reason why it should be read into the record.

Mr. SPELL. At this time I would like to offer in evidence document marked "Government Exhibit 9" for identification, which is a contract to do painting on an apartment building.

Mr. DAWSON. If your Honor please, I notice that there are attached a number of letters here. I have no objection to the contract itself, but I think anything in the letters might be objectionable. I haven't gone through them but they might be self-declarations. They may be segregated.

The COURT. What do you think about it?

Mr. SPELL. Well, I haven't looked through it myself in its entirety. However, I had in mind only the offering of the contract itself, so we will segregate that.

Right now I offer in evidence a contract to do painting and papering on an apartment building owned by the McClaine Company and marked "Government Exhibit 9" for identification.

Mr. DAWSON. I have no objection to that.

(Document produced by Mr. McClaine heretofore marked "Government Exhibit 9" for identification was thereupon received in evidence) (R. 321).

By Mr. SPELL:

Q. Have you segregated the checks on the three houses, for the work done on the three houses, totaling \$640, and from the work done on the apartment house?—A. Yes; with the exception of the last checks I held back—I think that was included on one of the checks of the apartment building.

Q. What was the amount of that check; the amount included in the check?—A. The check was for \$104.47. \$20 of that was applied for the contract of the three houses and the balance on the contract on the apartment.

Q. Do you have all the checks showing the payments on the contract for the painting of the apartment house?—A. I have.

Mr. SPELL. I would like to have these marked as a group.

(Checks produced by Mr. McClaine were marked "Government Exhibit 10" for identification.)

Mr. SPELL. At this time I would like to offer in evidence the checks showing the payments to Mr. Cox for work done on the three houses and one apartment building, which have been marked "Government Exhibit 10" for identification.

Mr. DAWSON. If they are properly identified, we have no objection. They haven't been properly put in evidence yet. The exhibit has not been identified by this witness, your Honor.

By Mr. SPELL:

Q. You produced those checks in response to a Government subpoena?—A. I did (R. 322).

Q. They are checks that your company issued to Mr. Cox?—A. It is not a company.

Q. Your real estate agency; is that right?—A. Some of the checks are signed by my son and some by myself. We are partners.

Q. I see. Now, some of those checks are paid out for paint?—A. Yes.

Q. Will you explain that, please?—A. We had a Winslow Company who furnished the painting material that went into this apartment building and we charged that against the contract.

Q. That was part of the contract?—A. Yes; that is right.

Mr. MILLER. You paid an attorney's fee. Is that part of the contract also?

By Mr. SPELL:

Q. I notice a check here to Mrs. Anna Hedrick, \$42.06, signed by C. C. McClaine, dated December 28, 1939. Is that part of the contract?—A. Yes, sir.

Q. Will you explain that, please?—A. Mr. Cox didn't pay some of his employees and they served notice that they hadn't been paid and we paid through Anna Hedrick, attorney, and charged it against his contract.

Q. Do you have a letter from Mr. Cox agreeing that you would pay the social security, workmen's compensation, and you would deduct it from his contract?—A. I have (R. 323).

Q. Will you produce that letter, please?

The COURT. How is that material?

Mr. SPELL. We want to show all the payments under this contract.

Mr. DAWSON. I don't think it is material at all.

The COURT. All you have to show is how much was paid. It doesn't make any difference whether he paid directly or not and how much his profit was. That is all. Of course, I am not going to interfere with your examination but it is taking a lot of unnecessary time, it seems to the Court.

Mr. SPELL. This is the last document I have to offer.

By Mr. SPELL:

Q. Will you please produce that, Mr. McClaine?

(The witness produced a paper.)

Mr. SPELL. Will you please mark this "Government 11" for identification?

(Document produced by Mr. McClaine was marked "Government Exhibit 11" for identification.)

Mr. SPELL. At this time I offer in evidence a letter signed by Harry C. Cox which purports to show the deduction of \$22.50 for workmen's compensation insurance and the sum of 89 cents for public liability insurance. This letter has been marked "Government Exhibit 11" for identification. I offer it in evidence at this time.

Mr. DAWSON. I have no objection.

(Document heretofore marked "Government Exhibit 11" for identification was thereupon received in evidence.)

Mr. SPELL. I would like to read this letter to the jury (R. 324). I shall now read Government Exhibit No. 11:

"ARLINGTON, VA.,
"December 26, 1939.

"C. C. McCLAINE,
2100 Wilson Blvd., Arlington, Va.

"DEAR SIR:

"My pay roll on the paint job on your apartment building at 16th and North Barton Sts., Arlington, Va. (your Job # 40) under my contract with you dated July 21, 1939, was \$737.92 and you may deduct from

the amount due me under said contract Workmen's Compensation and Public Liability Insurance as follows:

"Compensation Insurance \$737.92 at \$3.05 per \$100.00-----	\$22.50
"Public Liability Ins. \$737.92 at .12 per \$100.00-----	.89
	\$23.39

"You are hereby authorized and directed to deduct \$23.39 from the amount due me under the said contract dated July 21, 1939.

"This is to state also that I have deducted Social Security from all of my employees and will make a report to the Federal Government and the State of Virginia in due course of the amount so deducted, and also the amounts due by me for Social Security and due the State for unemployment insurance, and further that I will pay the amount of same to the respective authorities for which I have accepted exclusive liability under my said (R. 325) contract with you dated July 21, 1939.

"Yours truly,

"(Signed) HARRY C. Cox."

Mr. MILLER. Is that the same one that this contract was on?

By Mr. SPELL:

Q. What contract was this on?—A. For \$1,650 on the apartment building.

Mr. MILLER. This is the one you just introduced as No. 9?

Mr. SPELL. No. 11.

Mr. MILLER. The contract is No. 9 in evidence.

Mr. SPELL. Yes; I have no further questions.

Cross-examination by Mr. MILLER:

Q. Mr. McClaine, I believe you said your son and Mr. Cox made the arrangements; that is, your son appeared on most of the arrangements with Mr. Cox?—A. The contract is signed by my son.

Q. Where is your son now?—A. He is in the office in Virginia.

Q. And you and he are together?—A. Yes.

Q. This contract, Government Exhibit 9, I notice is also signed by M. G. Whitman, in addition to Harry C. Cox, and your representative. Who was M. G. Whitman?—A. He was supposed to be a partner at that time.

Q. Of Mr. Cox? (R. 326.)—A. Yes.

Q. He was an experienced painter?—A. Yes.

Q. And approximately how long did it take Mr. Cox to perform that job, Mr. McClaine, from your records?—A. Do you mean the first contract?

Q. Yes; the contract that these checks cover here.—A. Each one or the three houses?

Q. What does your checks cover?—A. All of them.

Q. How much for each one of them?—A. The three houses for \$640. There was \$20 extra on the garage, and \$5 extra on one house, and I think caulking the windows, \$9. I think it makes \$674.

Q. What was the apartment?—A. That was \$1,650, revised later to \$1,450, and \$8 extra for floor material, as I recall. \$1,458.

Q. You say that was revised later from \$1,650; after you agreed to pay him \$1,650, why did you cut it?—A. We bought our cabinets already finished. He was to paint the cabinets, and we changed the terms on the cabinets.

Q. How long did it take him to paint, or rather his men who were doing the work, on those houses, according to the records?—A. Well, the first job was June 24th, and the last one was August 26th, 1939. That is, \$20 paid January 22, 1940. That was held back.

Q. That was June 24 and August 26?—A. That would be two months (R. 327).

Q. Two months and two days?—A. It might be two days—I don't know exactly.

Q. That was on the houses?—A. Yes.

Q. Now, on that apartment house, what was the period covered?—A. The first payment covered October 21, 1939, and the last January 2, 1940.

Q. That was two months and two days also?

(There was no response.)

Q. About how many men did he have working on the house job? How many men were there? Do you know?—A. Four.

Q. And on the apartment job?—A. Five or six.

Q. You have been in this business a number of years, haven't you—your present contracting business?—A. No.

Q. What experience have you had in this?—A. We haven't been building only since 1935.

Q. For about five years?—A. Yes.

Q. Before then did you have any experience in painting?—A. And in repair work.

Q. That is in Arlington?—A. Yes.

Q. About what does a painter working on a job like this earn?—A. We didn't pay him anything. He had it by contract (R. 328).

Q. I know, but I mean when you did this repair work before you did this by contract, when you hired men, what did you pay them a day?—A. That all depends on the class of work and the conditions.

Q. On this work on these three houses and this apartment house?—A. Well, I don't think you could make a comparison. If we hire a man to do a little job and it takes a half day or a day, you may have to pay him more.

Q. Well, the man who would work for two months and two days on a job. How much a day would he get?—A. We never did that.

Q. You said that you had some experience before you went in the contracting business; that you hired men to do repair work, doing similar work?—A. Repair work isn't similar.

Q. You are hiring men now, aren't you?—A. No.

Q. It is all under contract?—A. Yes.

Q. Do you know what a paperhanger earns a day?—A. Some of them make more than others. We just hire them on the best terms that we can.

Q. Do you have any knowledge at all of what they make?—A. Well, painters make from four dollars—maybe six dollars a day.

Q. And they work seven full days a week?—A. Not any more, they don't (R. 329).

Q. Five or six days?—A. No; I don't think so.

Q. Sometimes it is pretty difficult to get them, isn't it?—

A. Well—

Q. You, I believe, said you entered an arrangement with Mr. Cox whereby you paid the paint man yourself?—A. Yes; that was by agreement with Mr. Cox.

Q. And you designated what kind of paint should be bought?—A. Yes.

Q. He had to buy it from the person that you designated?—A. Yes.

Q. All the paint was bought from W. R. Winslow Company?—A. On the apartment contract; yes.

Q. I show you these checks payable to W. R. Winslow Company in the amount of \$252.21, \$243.77, \$96.53, totaling \$592.51, that you produced here, and ask you if that is all that was paid to the paint man; that is, the man from whom Mr. Cox bought the paint on the apartment job. How much was the paint bill? Can you tell me?—A. These checks—the first one here, \$243.77, was all charged against Mr. Cox's contract. This check, \$252.21, and there is another one, \$234.56, chargeable against this contract. The next check of \$96.53, there is another one, \$91.47, charged against the contract.

Q. Well, now, do you have among your records what the whole painting bill was? In other words, have you the total in your records there (R. 330)?—A. Yes.

Q. How much was it?—A. \$569.82.

Q. \$569.82?—A. Yes.

Q. And the amount of his contract was \$1,450; is that right?—A. Yes; it was \$8 extra.

Q. \$1,458?—A. Yes.

Q. And that was the job he had five or six men working on?—A. Yes.

Mr. MILLER. That is all.

Redirect examination by Mr. SPELL:

Q. Just one question, please.

Mr. MILLER. May I ask one other question, please?

The COURT. I knew it was too good to be true.

By Mr. MILLER:

Q. Did Mr. Cox lose money on these jobs?—A. I wouldn't have any way of knowing that.

Q. Have you given him any work since then?—A. No.

Q. Why?—A. I haven't had any.

By Mr. SPELL:

Q. Mr. McClaine, the contract for the apartment house was signed by Mr. Cox and another party? (R. 331)—A. Yes.

Q. Who was the other party?—A. Whitman.

Q. He didn't do any of the work?—A. No.

Q. Mr. McClaine, you don't know whether or not Mr. Cox paid his men \$4 or \$5 or whatever he paid them?—A. I don't know.

Mr. SPELL. That is all.

The WITNESS. It was none of our business.

Recross examination by Mr. MILLER:

Q. Isn't it a fact that you are having some painting and papering done even at the present time?—A. We haven't done any building since.

Q. None at all since then?—A. We are now, but up until a month ago we weren't.

Q. That is an apartment house?—A. Yes.

Q. But you are having some painting and papering done? You have had some painting and papering done since this job?—A. A little repair work; yes (R. 332).

* * * * *

RAYMOND K. FOXWELL was called as a witness for and on behalf of the United States and, having been first duly sworn, was examined and testified as follows:

Direct examination by Mr. SPELL:

Q. Will you please state your name?—A. Dr. Raymond K. Foxwell.

Q. Where do you live, Dr. Foxwell?—A. I live in Raymond Street, Chevy Chase, Maryland.

Q. Where do you have your office?—A. In the Medical Science Building in Washington.

Q. Dr. Foxwell, where did you receive your medical education?—A. I went to University of Maryland.

Q. When did you graduate from that institution?—A. 1916.

Q. Have you followed a special field of medicine?—A. Yes. Since 1918 I have specialized in nervous and mental diseases.

Q. Where did you receive your training, Doctor?—A. I had internship in Pittsburgh, and I was assistant superintendent of state hospital for the insane, in Maryland (R. 337), for a year, and I was during the World War with the Army. For 20 months I was chief of the section of nervous and mental diseases, base hospital, Camp Meade, and since 1920 I have been in private practice in Washington, practice limited to nervous and mental diseases, and during that time have been associate psychiatrist at Gallinger Hospital and other hospitals, and consultant in nervous and mental diseases at the diagnostic center known as Mt. Alto Hospital for the past, about 15 years.

Q. Doctor, as a specialist in nervous disorders, will you please explain to the jury the meaning of the term "psychoneurosis"?—A. Psychoneurosis is an abnormal condition of the nervous system in which the patient has an unusual or strange reaction to the ordinary stimulus, the ordinary situation. There are two kinds of diseases of the nervous system, organic and functional.

Organic: By "organic" we mean such things as brain tumors or structural change in the brain or spinal cord.

The functional condition: There is no pathology, there is no structural change, but the condition is considered functional, and under that classification come the psychoneuroses.

Q. Doctor, will you tell us the various types of psychoneurosis?—A. The main types, the main subdivisions, are anxiety neurosis, hysteria, neurasthenia, psychasthenia, neurocirculatory asthenia, and I believe I mentioned hysteria. Those are the main subdivisions (R. 338).

Q. Doctor, is it a fact that psychoneurosis and insanity are fundamentally distinct and different diseases, and that psychoneurosis does not end in insanity, no matter how long it persists?

Mr. DAWSON. Just a minute, your Honor. That is objected to. It is clearly a leading question.

The COURT. What is the question?

The REPORTER. "Doctor, is it a fact that psychoneurosis and insanity are fundamentally distinct?"—

The COURT. You mustn't ask leading questions. The Court has cautioned you about that several times.

By Mr. SPELL:

Q. Doctor, is psychoneurosis in a moderate degree considered curable?—A. It is.

Q. What course of treatment do you prescribe?—A. Well, the patient in the average case is given sometimes mild sedative drugs and various other forms of treatment. Mainly they are encouraged to work at their usual occupation, as most of them are self-centered or what we call an introvert, inclined to examine themselves too closely. Therefore they are encouraged to follow their usual occupation.

Q. Doctor, how many psychoneurosis patients have you treated this past year?—A. Several hundred, probably.

Q. Approximately how many of them are engaged in their usual occupations?—A. During treatment? (R. 339.)

Q. Yes, sir.—A. More than 90 percent.

Q. Doctor, assume a man that has a diagnosis of psychoneurosis, moderate. What effect will moderate physical or mental exertion have on that man's health?—A. A patient with a moderate degree of psychoneurosis is encouraged to work to divert his attention, and it should have a beneficial effect upon his health.

By the COURT:

Q. The difficulty is to get him to do it, isn't it?—A. Sometimes; yes.

The COURT. Of course, that is the difficulty.

By Mr. SPELL:

Q. Doctor, how many cases of psychoneurosis have you treated in your professional experience?—A. I wouldn't be able to guess at it offhand.

Q. How many have you had under your observation in the last month?—A. Oh, I'd say twenty.

Q. Is psychoneurosis a common occurrence, Doctor?—A. Very common occurrence; yes.

Mr. SPELL. You may have the witness.

Cross-examination by Mr. DAWSON:

Q. Doctor, is psychoneurosis always curable?—A. It's always considered so.

Q. Does it depend in some cases upon the existence of other disabilities?—A. Yes; that's true (R. 340).

Q. And you say it is a functional disability?—A. Yes; not based on organic changes.

Q. It is where the patient believes—has a mental condition where he thinks he is not able to do certain things; is that it?—A. No. The patient has symptoms which are functional, not due to structural changes.

Q. Did you ever examine Mr. Cox in this case?—A. I don't recall ever having.

Q. And where psychoneurosis or hysteria exists over a long period of years, the same degree, would you say that was a curable or incurable condition?—A. I didn't quite understand you.

Q. Where it exists for 14 to 16 years, would you say that that was a curable or incurable condition?—A. That's about as long as I recall any lasting.

Q. Isn't it true, Doctor, in a great many cases that psychoneurosis may be the forerunner of another psychotic condition?—A. No; that is not true.

Q. In any of these cases you have ever had, Doctor, isn't it a fact that a great many cases may be diagnosed as psychoneurosis or hysteria or neurocirculatory asthenia or constitutional psychopaths, and all of those are more or less associated with some kind of psychosis?—A. It is true that some psychoses may for a period of a few months be confusing. They may have some symptoms that you could classify briefly as neurasthenic, but the onset of a psychosis as a rule is entirely different from a psychoneurosis (R. 341).

Q. Many of the medical authorities today do not agree where the dividing line is between neurasthenia and psychoneurosis; isn't that a fact?—A. I don't think so.

By the COURT:

Q. You don't?—A. No, sir.

By Mr. DAWSON:

Q. And according to a great many of the medical authorities, the line of demarcation is very thin between a so-called hysteria and a psychoneurosis, isn't it?—A. Those would be the rare and exceptional case you run across, of that type.

Q. You wouldn't want to tell this jury, from your experience that you have had, that there are no authorities today, no medical authorities today, that do not say that psychoneurosis is in some way associated with or connected with a psychosis, do you?—A. I say, my opinion, they are entirely different.

Q. Your opinion. You know there are recognized medical authorities to the contrary, are there not, Doctor?—A. Oh, yes. There is a great difference of opinion among different authors on various subjects.

Q. Now, you say that a psychoneurosis is an abnormal condition. Does the average individual have a psychoneurosis?—A. Most everyone sometime in his life has at least a mild psychoneurosis, I believe.

Q. Well, would that be what you call a neurasthenia, or would it be what you call a psychoneurosis? (R. 342.)—A. It means the same thing. Neurasthenia is a class, is a subdivision, of a psychoneurosis.

Q. Well, neurasthenia mild would be the beginning point, perhaps, of a psychoneurosis, wouldn't it?—A. Well, they are the same thing you speak of.

Q. Well, it would be, you might say, the inceptency of a psychoneurosis, wouldn't it?—A. Neurasthenia is a psychoneurosis.

Q. Yes, but it is the beginning point, isn't it?—(There was no response.)

Q. You don't agree with that?—A. I don't understand your question. I have told you they are the same thing.

Q. In other words, a neurasthenia is a psychoneurosis, but a neurasthenia is the first point in the so-called nervous condition, isn't it?

The COURT. What Mr. Dawson means, I think, is: Is not "neurasthenia" the word usually used for a mild case of psychoneurosis?

That is what you really mean?

Mr. DAWSON. Yes, that is what I really mean. I mean it is the first stages, you might say.

The WITNESS. Yes, you might take the general practitioner that doesn't go into the different classifications very deeply; neurasthenia is the term that's used to cover practically all psychoneurosis by the general practitioner.

By Mr. DAWSON:

Q. It is the cover-all proposition?—A. Yes, that's it (R. 343).

Q. Yes. And a great many authorities, medical authorities I mean, wouldn't know the difference between a hysteria and a psychoneurosis, would they? I mean you would have to be an expert to know, wouldn't you?—A. No. Some good general practitioner could make a differential diagnosis.

Q. Well, he would be a man that had a lot of experience, wouldn't he?—A. Yes; that is correct.

Q. Yes. All right. Now, in this case when you are testifying, Doctor, this psychoneurosis is only one of this plaintiff's disabilities. You are only testifying as to psychoneurosis?—A. That is correct.

Q. Yes. Assume, Doctor, that this man has a definite and positive and undisputed diagnosis of mitral regurgitation in 1918. Assume, further, that he has a definite and positive history—and not only history but positive findings by Government physicians—of a moderately advanced tuberculosis covering the apexes of both of the tops of his lungs.

Now, would that have anything to do with the psychoneurosis?

Mr. SPELL. I object, your Honor. The question is not full enough to give the doctor——

The COURT. It is for cross-examination. Proceed.

Mr. DAWSON. Do you want the question read to you, Doctor?

The WITNESS. Please. Just the latter part of that again.

The REPORTER (reading). "Assume, further, that he has a definite and positive history—and not only history but positive (R. 344) findings by Government physicians—of a moderately advanced tuberculosis covering the apexes of both of the tops of his lungs.

"Now, would that have anything to do with the psychoneurosis?"

The WITNESS. It may or may not have. It depends entirely on the cause of his particular psychoneurosis.

By Mr. DAWSON:

Q. And then the point I am trying to make, Doctor, is this: You couldn't give any definite opinion in this matter unless you had had this man for examination over a period of time and made definitely your own diagnosis in the case; is that correct?—A. Well, I gave the opinion on the psychoneurosis, not on this particular man.

Q. In other words, you are just giving an opinion on what psychoneurosis may or may not be in the general case; is that it?—A. That is correct.

Q. Now, would a worry that the average man might have, or that this plaintiff might have, as to his heart condition or as to the condition of his tuberculosis—would that cause a psychoneurosis? Would that cause that neurotic condition?—A. It could cause such a psychoneurosis, or the psychoneurosis may be from some other cause that we know nothing of.

Q. Well, in most of your psychoneurosis cases isn't it a fact that the patients that you are attending are usually worrying about some condition they have? (R. 345.)—A. Not necessarily their physical condition; worrying about financial conditions or home conditions or thousands of other things.

Q. It is usually based more or less on a worry?—A. Usually on some emotional conflict.

Q. Well, as far as they are concerned, Doctor, they have a disability, do they not?—A. Who is that?

Q. I mean that class of patients have a real disability, do they not?—A. Oh, yes.

Q. It doesn't necessarily mean that the man is malingering, does it?—A. No, no.

Q. In other words, he is not faking or anything of that kind, is he?—A. No.

Q. Well, Doctor, do you know Dr. A. E. Marland, who is a mental and nervous specialist here in the city?—A. Yes; I do.

Q. And do you know a Dr. Max Faber, who is a mental and nervous specialist in the city?—A. Slightly; yes, sir.

Q. And do you know a Dr. Ray F. Gwynn, who is also a mental and nervous specialist in this city?—A. Yes.

Q. Are they all——

Mr. SPELL. Talk——

The COURT. These are preliminary questions. Wait until (R. 346) he asks his questions. Proceed.

By Mr. DAWSON:

Q. Do they all live in Washington?—A. Yes; I think so.

Mr. DAWSON. I think that is all, your Honor.

Mr. SPELL. If your Honor pleases, I should like to ask a question I probably should have asked on direct.

The COURT. All right, sir.

Redirect examination by Mr. SPELL:

Q. Doctor, I ask you to assume an individual who had a diagnosis of "hysteria" in 1926, diagnosis of "psychoneurosis, hysteria, moderate" in 1928, diagnosis of "neurasthenia, moderate degree, neurocirculatory in type" in 1929, and a diagnosis of "psychoneurosis, mixed type, moderate" in 1936, and also in 1936 had a diagnosis of "psychoneurosis, neurasthenia, moderate," and ask you to think of a man who had had those diagnoses over a period of time.

I wish you also would assume that this man has run a trucking business during all the years in the diagnoses covered; that he was a mail carrier in 1928 to 1936, driving his automobile; that he did extra work around the post office from 1927 to 1935, carrying bundles and delivering packages; that during that time he drove part of the way or most of the way from Arlington, Virginia, to Miami, Florida; that he averages driving an automobile five or six thousand miles a

year; that he has engaged as a painting and paperhanging contractor supervising men on labor from 1928 to and including the last date of the diagnosis I just stated (R. 347).

I ask you to assume that individual and state if you have an opinion——

Mr. DAWSON. An opinion on what?

By Mr. SPELL:

Q. (Continuing.) Of whether his psychoneurosis was aggravated by this work record that I have stated to you.

The COURT. Objection sustained. No human being could answer that question.

By Mr. SPELL:

Q. Doctor, do you have an opinion of whether or not the condition in 1936 was worse than it was in 1928?

Mr. DAWSON. I just object to that. There is no question there.

The COURT. How could he know anything about that?

Mr. DAWSON. No.

The COURT. And, of course, in order to clarify the situation some, there are other fundamental objections. You stated he was running a trucking business. There is nothing in the statement to indicate the size of the trucking business, how it was conducted, who conducted it. Your question is just such that it is impossible for the witness to answer it.

Mr. SPELL. Your Honor, I will agree to amendment if counsel has any to offer to my——

The COURT. Well, no, no. Counsel do not have to formulate the question for you. I don't believe you can formulate a question that would be admissible in evidence, but you may try it if you wish.

By Mr. SPELL:

Q. From the diagnoses I have stated to you, which began (R. 348) in 19——

The COURT (interposing). There is evidence in this case of hardening of the arteries. There is evidence by the eye examination of hardening of the arteries of the brain in this case. You see, you have not covered that ground.

Mr. SPELL. Well, if your Honor pleases, if counsel wishes to ask the question after I have finished——

The COURT. Well, I know, but the Court has some function.

Mr. SPELL. He may ask him to assume those additional facts.

The COURT. The Court has some function here, and the Court, in a matter as important as this, on a question as vital as this, cannot sit here idly and let a question that is clearly wrong be answered, whether counsel objects or not.

Mr. DAWSON. And, your Honor, I never objected because——

The COURT. I am not criticizing you at all.

Mr. DAWSON. Yes.

The COURT. I didn't mean it in that sense, but I mean the Court has a perfect right to object, itself, if it sees fit to do it.

Mr. SPELL. Yes; your Honor.

By Mr. SPELL:

Q. Doctor, I will ask you to assume an individual who has a diagnosis of "psychoneurosis, hysteria, moderate" in 1928 and has a diagnosis in 1936 of "psychoneurosis, neurasthenia, moderate." I ask you if in your opinion this man's disability had increased over those years.

Mr. DAWSON. I object to that question on the ground he is asking him to base his opinion on the opinion of somebody else (R. 349).

The COURT. I sustain the objection. You see, "psychoneurosis, moderate"—it is a matter of common knowledge that these diseases of the brain are the most obscure things in life; and not only the most obscure, but medicine hasn't scratched the surface of them yet.

Now, then, one doctor might say it was a psychoneurosis moderate; another physician might classify it another way. There is no evidence that the same physician made both of those examinations; and there is no evidence that, if he had, he would have the same thing in mind: one physician. As obscure as these diseases are known to be, are generally known to be among informed people of all classes, whether they be

physicians or otherwise, as obscure as they are, the same physician might diagnose a condition in one way today and, if he forgot about the patient, in another way next week.

Now, then, to undertake to ask this physician to formulate an opinion upon what some doctors did in 1928 and 1936, the Court cannot permit it.

Mr. SPELL. Your Honor, what I had in mind was that I haven't referred to Mr. Cox. I asked the psychiatrist, as an expert, to assume a man with those diagnoses. I didn't pin it to Mr. Cox.

The COURT. Well, you have got to pin it to Mr. Cox; he is the man who is bringing this suit. You may not wander all over the country on this thing.

Mr. SPELL. This doctor is testifying as an expert, and I am asking him about his two diagnoses as an expert. I haven't put in any other evidence, who examined him, what physician. I just asked him to assume that those diagnoses are correct (R. 350).

The COURT. The Court is compelled to sustain the objection.

Mr. SPELL. That will be all, Doctor (R. 351).

* * * * *

Mr. SPELL (reading from medical records):

"Discharge report upon Harry C. Cox. Report dated (R. 333) U. S. Naval Hospital, Washington, D. C., April 16, 1923. Said report shows:

"4-16-23: Patient refuses to allow the administration of a general anaesthetic for a laryngeal examination. Discharged at his own request and against medical advice.

"Report signed:

"W. O. BAILEY, M. D.,

"Lieut. (MC), U. S. N."

"Report of physical examination of Harry C. Cox while at U. S. Naval Hospital, Washington, D. C., on April 19, 1923. Said report shows:

"Present complaint: Hoarseness.

"Physical examination: Well developed and fairly well nourished adult male. Pupils react to light

and distance. Reflexes normal. Abdomen negative. Heart negative. Normal outline. Blood pressure, 126/84. Cardio-respiratory: Murmur at pulmonic area.

"X-Ray: Both lungs and apices are clear. Diaphragm smooth. Some hilus infiltration.

"Nose and throat: Vocal cords distinctly seen, move actively and approximate. Slightly pale. No lesion seen. Nose normal. Tonsils have been removed.

"Wassermann negative. R. B. C."

I don't know what "R. B. C." means.

Mr. MILLER. That means red blood corpuscles.

Mr. SPELL. I shall continue reading:

"Wassermann negative. R. B. C. 5,200,000; W. B. C. 11,000; polys 66%; lymphs 31%; LMP 2%; eosin 1%. Urine (R. 334) negative.

"10 sputa negative for B. tuberculosis.

"Special Tuberculosis report: Height, with shoes, 72 inches. Weight, without coat, 174. Sputum: Negative.

"Examination of Chest: Auscultation—Right lung: Few ronchi and squeaks which clear upon cough.

"Summary: None.

"Pulmonary Diagnosis: No disease."

I shall now read from page 18:

"Reports of examinations of Harry C. Cox at Washington Sub-District Office, September 14-18, 1923. Said reports show:

"Physical Examination:

"Dr. F. L. Williman, 9/14/23: Exam. completed at this office 9/18/23.

"General appearance good. Height 72 inches. Weight 175 pounds. Temperature 37° C. Nose, throat, and eyes: Referred for special examination. Ears and teeth: Negative. Tongue: Clean. Neck, thyroid: No glandular enlargement. Chest: Referred for special examination. Heart: P. M. I. 5th interspace inside M. C. L. No abnormal pulsations; not enlarged to

percussion. No thrills; no murmurs. Pulse 78; after exercise, 110; after two minutes rest, 82. Blood pressure, 120/78. Abdomen: Symmetrical, well nourished. No operative scars; no tenderness, rigidity, or masses. Liver and spleen: Negative. No hernia; no varicose veins; no hemorrhoids. Genitalia: Negative. Extremities (R. 335): Negative except right shoulder" (R. 336).

"Physical examination:

"Dr. F. L. Williman, September 14, 1923: Examination completed at this office September 18, 1923.

"General appearance good. Height 72 inches. Weight 175 pounds. Temperature 37 percent centimeters——"

Mr. COSTELLO. Centigrade.

Mr. SPELL. How is it?

Mr. COSTELLO. Centigrade.

Mr. DAWSON. Centigrade.

Mr. SPELL. Centigrade. Thank you. [Reading:]

"Nose, throat, and eyes: Referred for special examination. Ears and teeth: Negative. Tongue: Clean. Neck, thyroid: No glandular enlargement. Chest: Referred for special examination. Heart: P. M. I." (R. 351).

I am sorry I can't tell you what that means. Counsel can help me on that.

Mr. DAWSON. I am not familiar with these early ones.

Mr. SPELL (reading):

"5th interspace inside M. C. L. No abnormal pulsations; not enlarged to percussion. No thrills; no murmurs. Pulse 78; after exercise, 110; after two minutes rest, 82. Blood pressure, 120/78. Abdomen: Symmetrical, well nourished. No operative scars; no tenderness, rigidity, or masses. Liver and spleen: Negative. No hernia; no varicose veins; no hemorrhoids. Genitalia: Negative. Extremities: Negative, except right shoulder.

"Dr. E. B. Jones, September 18, 1923—Nose and Throat:

"Complaint: Loss of voice; it is weak and husky. Throat not sore; has frequent tickling sensation and coughing. Tonsillectomy some time ago. No trouble with nose. Examination: Nose is in very good condition.

"Dr. Joel A. Tilton, September 14, 1923—Orthopedic:

"This patient complains of pain in the left shoulder. Physical examination reveals no atrophy of any of the muscles about the shoulder girdle, no limitation in motion, no periarticular thickening, no definite crepitation on motion, and no marked sensitiveness on deep palpation. The symptoms in this case seem for the most part subjective and are not particularly characteristic of any disability about the shoulder joint. There is no orthopedic condition diagnosed as the result of this examination" (R. 352).

"Special Pulmonary Report, Dr. P. P. Crimmins. Examined September 14, 1923:

"Temperature 37 c. Pulse 78. Time of examination: 1:40 P. M. Weight, without coat, 175 lbs. Sputum: Negative.

"Examination of Chest:

"Shape: Appearance good. No anemia. Nutrition good. Well developed, flat chest. Mobility: No restriction and no lagging. Palpitation—Fremitus: Normal. Auscultation—Left lung: Inspiration sharpened throughout. Bronchovesicular breathing, mild degree. Few rales heard at the apex, which disappear on coughing. Voice sounds normal.

"X-Ray of lungs not justified at this time by clinical evidence.

"Claimant is not taking prevocational training.

"Pulmonary Diagnosis: There is no evidence of lung disease at this examination.

"(Signed) P. P. CRIMMINS,
Specialist in Tuberculosis,
U. S. Veterans' Bureau Dispensary."

Special report of P. P. Crimmins. Examined April 4, 1924:

"Temperature 37. Pulse 100. Height, with shoes, 5' 11" inches. Weight, without coat, 180 lbs. Normal weight (Man's statement), 180 lbs. Sputum: Negative.

"Examination of Chest:

"Shape: Appearance good. No anemia. Nutrition good. Flat chest. Mobility: No restriction. No lagging. Palpation—Fremetus: Normal. Percussion—Both lungs: (R. 353) Impaired at the apex and suprascapular region. Auscultation—Both lungs: Bronchovesicular breathing. Mild increase of voice sounds. No rales.

"X-Ray of lungs not considered necessary at this examination.

"Pulmonary Diagnosis: No evidence of active lung disease at this examination.

"(Signed) P. P. CRIMMINS,
"Specialist in Tuberculosis."

"Report of physical examination of Harry C. Cox at Dispensary, Washington, D. C., October 24-25, 1924. Said report shows:

"Physical Examination: Temperature 37½. Height, with shoes, 5 ft. 11 inches. Weight, without coat, 177 lbs."

Dr. W. H. MacKay, October 24, 1924. General examination:

"Very well developed and nourished. Height, 5' 11". Weight 177 pounds. Temperature 37½c. Head: Eyes, negative. Teeth: Teeth missing from upper front, several carious. Gums, negative. Tongue, clean. Thyroid: no glandular enlargement. Lymph nodes, not palpable. Chest: Special rept. Heart: Apex impulse 5th interspace within M. C. L." I am sorry I don't know the names of those initials. "No thrills or murmurs. Pulse 104; after exercise, 120; after two minutes, 84, lying down. Abdomen,

negative. No operative scars. No tenderness. Liver, negative. No hernia. Genitalia, negative. No varicose veins."

Examination by Dr. E. B. Jones, on October 24, 1924 (R. 354):

"Complaint: Loss of voice. Examination: Nose, negative. Tonsils (faucial): have been removed; there is hypertrophy of the lingual tonsil. Slight chronic inflammation of pharyngeal wall. The vocal cords are injected and are spasmodic on attempted phonation. Diagnosis: Laryngitis, chronic. Aphonia, functional. Tonsillitis, lingual, chronic. Treatment: Local applications and physiotherapy; neurological."

Examination of lungs. Examined October 25, 1924:

"Shape of chest: Normal. Mobility: Normal. Palpation—Fremitus: Normal. Percussion—Both lungs: Impaired at apex and supra-scapular region. Auscultation—Both lungs: Fes sibilant rates at apex and base which disappear on cough. Inspiration sharpened. Voice sounds normal.

X-Ray not taken at this examination.

"Pulmonary Diagnosis: No evidence of lung disease at this examination.

"Signed: P. P. CRIMMINS,
Tuberculosis Specialist."

Report of consultant in internal medicine on Harry C. Cox while at U. S. Veterans' Bureau, Diagnostic Center, Washington, D. C. "Report dated July 25, 1925. Said report shows:

"Examination of the Chest:

"The patient is well nourished; chest is well formed. There is no marked asymmetry and no marked sclerosis. The trachea in mid-line. Expansion equal, synchronous and adequate on the two sides. The percussion note is slightly higher pitched above the second rib and third (R. 355) dorsal spine on the left side than on the right.

"Breath sounds are distinctly less intense throughout the right side than on the left. There is a slight

roughening of the breath sounds in the left apex, both front and back. No rales can be elicited at this examination.

"Cardio-vascular:

"The pulse is regular; synchronous on the two sides. Rate 80 standing; lying down 74; 88 immediately after exercise, returning to 74 two minutes after exercise. There is no abnormal pulsation in the neck. P. M. I. is in the fifth interspace just inside the mid-line. There are no thrills. Heart outline by percussion is in normal limits. There are no murmurs or accentuated second sounds. The muscle sound is good. Response to exercise is good.

"Conclusion: No evidence of cardio-vascular disease.

"Final Conclusion: Re-examination and later X-Ray of films, negative. No evidence of pulmonary tuberculosis.

"Report signed: ROY D. ADAMS,
Consulting Specialist."

"Report of Special Heart Examination of Harry C. Cox. Report dated Regional Office, Washington, D. C., March 13, 1928. Said report shows:

"Examination:

"Auscultation: Heart sounds regular and of good quality and intensity. No murmurs heard. A2 is greater than P2.

"Radial pulses synchronous, equal, regular, and of (R. 356) good volume and tension. There is no pulse deficit. Radial and brachial arteries soft.

"Pulse—Recumbent, 78; standing, 84; after exercise, 102; three minutes later, 78.

"Blood pressure—standing, 122/86; after exercise, 130/82; three minutes after exercise, 124/86.

"Slight dyspnoea but no cyanosis observed after exercise.

"Diagnosis: No cardiac disease found.

"Report signed: J. A. CONNOR, M. D.,
Cardiac Specialist.

"Report of physical examination of Harry C. Cox at U. S. Veterans' Bureau Dispensary, Washington, D. C., on March 14, 1929. Said report shows:

"Physical Examination:

"Temperature, 99. Pulse, 78. Time of day, 2: 35. Blood pressure, 125/85. Height, with shoes, 72 inches. Weight, without coat, 183; highest weight over the past year, 183; lowest weight over the past year, 175. Weighed by the examiner.

"Nose not obstructed. Neck, negative. Heart: No murmurs, accentuations or arrhythmia. Lungs: No abnormal signs. Claimant coughs frequently, apparently to clear the throat. Abdomen: No scars, tenderness, or hernia. Genitals: Inguinal and femoral nodes and anal region normal. Spine: Posture and flexibility normal.

"C. S. ROBBINS,
General Medical Examiner."

At the same time, the last examination, which was on (R. 357) March 14, 1929, the plaintiff, Mr. Cox, was examined for his lungs by G. J. Allen, T. B. specialist:

"Shape of Chest: Well developed and nourished chest."

Mr. MILLER. If your Honor please, that has been read in by us, if he wants to read it again, but it is in evidence.

Mr. SPELL. The diagnosis was read in by you, counsel.

Mr. MILLER. Oh, was that all?

Mr. SPELL. That is all. [Reading:]

"Mobility: Good. Palpation: Tactile fremitus not increased. Percussion—Both Lungs: No impairment noted. Auscultation—Both lungs: No rales. Mild broncho-vesicular breathing over apex."

Diagnosis read in by plaintiffs, but I shall repeat it:

"Pulmonary Diagnosis: Chronic pulmonary tuberculosis, minimal, apparently cured."

Examination of lungs. Examination made on October 15, 1929:

"Shape of Chest: Broad, deep, well developed and nourished. Mobility: Expansion good and equal on both sides. Palpation: Tactile fremitus normal. Percussion—Both lungs: No impairment noted. Auscultation—Right lung: Inspiration sharpened thruout; expiration prolonged; whispered and spoken voice conduction normal. No rales noted. Left lung: As above."

X-Ray of chest made on October 17, 1929, by Dr. Elward, roentgenologist:

"Radiostereoscopic examination of the chest shows thorax, heart and diaphragm normal. Considerable increase (R. 358) at each hilus with some calcification. Right vertebral branch markedly increased with some fibrotic changes noted in right upper lobe and apex. Lung parenchyma shows some slight increase thruout.

"Pulmonary Diagnosis: Tuberculosis pulmonary, chronic, minimal, inactive, apparently cured."

"Report of special heart examination of Harry C. Cox at U. S. Veterans' Bureau Regional Office, Washington, D. C., on December 4, 1930. Said report shows:

"Examination:

"Inspection: Long, broad chest. Slight pulsation noted in vessels of the neck. No cyanosis, dyspnoea nor edema present. Apex beat not visible.

"Palpation: P. M. I. felt in 5th left interspace in M. C. L. No thrill present.

"Auscultation: Heart sounds regular and of good quality and intensity. No murmurs heard. A2 is greater than P2."

"Radial pulses——"

The COURT. What was that? "A2 is greater than P2"?

Mr. SPELL. I think that is the heart beat, your Honor.

The COURT. Well, I suppose that is. But what does it mean? Do you know?

Mr. SPELL. I imagine, the way I understand it, when one beat is supposed to be a little louder than the other, to be the normal beat. I may be wrong, but that is my impression. Does that agree with your idea, counsel?

Mr. MILLER. I don't know what it means. I just don't know (R. 359).

Mr. SPELL. I think it refers to the heart beat, and to be normal one has to be a little louder than the other. That is what I understand.

The COURT. I am figuring on time a little bit. Can you give the Court any idea how much longer you will be in reading that, sir? I am not trying to hurry you.

Mr. SPELL. Yes, sir.

The COURT. You will take a good half hour, won't you?

Mr. SPELL. Your Honor, I don't have a great deal more. Let's see now. I should say this continuation of this will be about 15 or 20 minutes, probably.

The COURT. And will that be your last? Is that your last witness?

Mr. SPELL. I have one more doctor I should like to submit.

The COURT. Very well, sir.

Mr. SPELL (reading):

"Radial pulses synchronous, equal, regular, and of good volume and tension. There is no pulse deficit. Radial arteries soft.

"Pulse recumbent 78; standing 84; after exercise 96; three minutes after exercise 84. Blood pressure, standing 126/86; after exercise, 132/84; three minutes after exercise, 128/86. No cyanosis nor dyspnoea observed after exercise.

"Diagnosis: No cardiac disease found.

"Report signed: J. A. CONNOR, M. C.,
Heart Specialist."

"Report of Chest examination of Harry C. Cox at Out-Patient Division, Veterans' Administration Facility, Washington, D. C. Said report, which was re-

quested by (R. 360) Dr. Orr, on November 23, 1936, shows—

“Present”—it looks like “Present Complaint:

“I’m drawing \$50 per month compensation.”

Mr. MILLER. Where is that? Oh, “P. C.”

Mr. SPELL. Yes.

Mr. MILLER. Is that present condition? Is that what “P. C.” means?

Mr. SPELL. I presume so.

Mr. MILLER. It may mean something else. I don’t know. “P. C.” is all it reads there. I don’t know whether, your Honor, he ought to interpret what it means. I don’t know.

Mr. SPELL. Under that is “P. E.,” which I assume means present examination. He goes on to say, “Temperature,” and so forth. However——

The COURT. If you don’t know what it is, you cannot translate it.

Mr. MILLER. I move to strike out, if your Honor please, what he said there about that.

The COURT. All right. That may be stricken.

Mr. MILLER. “P. C.” Drawing compensation.

The COURT. You will just have to read it as it is.

Mr. SPELL. All right. Did you strike out the “I’m drawing \$50 per month compensation,” your Honor? Did you strike that out?

The COURT. No; just strike out the “present complaint.”

Mr. SPELL. Yes; your Honor.

(Reading:)

“P. C.: I’m drawing \$50 per month compensation.

“P. E.: Temperature is 98. Pulse is 78, and blood (R. 361) pressure is 160/112. Chest is well developed and well nourished. It is medium in length, broad and deep. Expansion is free and equal, breath sounds are of normal intensity. No rales elicited following cough. Whispered voice is normally transmitted. Percussion note is resonant. X-ray of chest requested.

“Diagnosis: 1. No respiratory disease. 2. Hypertension, moderate.”

If your Honor please, that is all we offer of the Government physical examinations of the veteran.

However, I do have a document here I should like to have marked, and offer it.

Mr. MILLER. May we approach the bench, if your Honor please, in reference to this matter?

The COURT. Yes.

(Counsel for both sides approached the bench and conferred with the Court, in a low tone of voice, as follows:)

Mr. MILLER. I just anticipate. I should like to know what he is offering, out of the hearing of the jury, if your Honor please, and we want to make an objection, I think, to it.

Mr. SPELL. Well, I am offering, if your Honor pleases—

Mr. MILLER. What is it? What is it?

Mr. SPELL. It is a complete certified statement of the compensation payments made to this veteran by the Government, and it was opened up by the plaintiff; and, under the decisions I shall be glad to hand to your Honor, I think we are entitled to put this in evidence and show it to the jury [handing papers to the Court] (R. 362).

The COURT. The fact that he is getting compensation, and how much he is getting?

Mr. SPELL. It has been opened up by the plaintiff.

The COURT. I don't care by whom it has been opened up; when there is objection it is not admissible testimony. It stops right there.

Mr. SPELL. I should like to submit some decisions on that point before your Honor makes up his mind.

The COURT. Well, you may submit them to me if you want to.

Mr. SPELL. May I get a statement on it?

The COURT. Yes. Go ahead.

Mr. SPELL. Will you grant me a few minutes, your Honor?

The COURT. Of course.

Mr. SPELL. Thank you.

(At this point Mr. Spell returned to the trial table.)

The COURT. What is that you have?

Mr. MILLER. We submit, your Honor, the Grossman case in the Ninth Circuit Court of Appeals. This is inadmissible also under the Lomico case.

The COURT. Yes. And what possible connection is there between that and this?

Mr. MILLER. Prejudicial for him to show——

The COURT. I know it is prejudicial, but what possible connection has it with the issue in this case?

Mr. MILLER. I can see none.

Mr. DAWSON. It has not any connection.

The COURT. Why, absolutely none (R. 363).

(At this point Mr. Spell returned to the bench.)

Mr. SPELL. Your Honor, we ask that this be admitted for a specific purpose.

The COURT. Don't talk too loudly.

Mr. SPELL. Yes. To show the jury the incentive the veteran had for working or not working.

The COURT. Oh, no. I couldn't let it in under such ground as that.

Mr. SPELL. That is the sole, limited purpose we offer it for, not as money gainfully paid to him but to show the presence of money.

The COURT. Young man, you couldn't get me to do that in a thousand years.

Mr. SPELL. Before you make up your mind I should like to have you read the Jennings case, *Jennings v. United States*.

The COURT. I will read it right now.

Mr. SPELL. 73 Federal 2d.

The COURT. 73 Federal 2d. You can get it out of my chambers. Whatever may be your ostensible purpose, your real purpose is to let the jury think he has an occupation, anyhow. That is your real purpose.

Mr. SPELL. No, your Honor.

The COURT. Well, I don't mean that you are conscious of it. It is subconscious.

Mr. SPELL. No. This man is getting this payment every month, your Honor.

The COURT. It is your subconscious mind; that is all.

Mr. SPELL. And it has a lot to do with his incentive to want to work, the necessity for work (R. 364).

The COURT. Just a minute. The other side might as well argue that if he was getting a hundred dollars a month, that if he was getting full compensation—he was getting full compensation in 1927—that that was conclusive evidence that he was totally and permanently disabled. And it would not have a thing in the world to do with it.

Mr. SPELL. It wouldn't be admissible if that were the purpose for which it was offered.

The COURT. Of course it would not be admissible, and that is just what I am talking about.

(A book was handed to the Court.)

The COURT. What is your page?

Mr. SPELL. It is 470, your Honor.

The COURT. 470?

Mr. SPELL. Yes, sir. And your other cases, too, that hold it admissible to show these payments, for restricted purposes——

The COURT. Don't talk too loudly.

(At this point counsel for plaintiff left the bench.)

The COURT. Well, this does not hold it is admissible in evidence. It simply holds it is not reversible error. That is all.

Mr. SPELL. But that is not the only case I have, of course. I have some in my brief I have submitted.

The COURT. The Court has not the slightest doubt but that it is inadmissible. Not the slightest.

Mr. SPELL. Your Honor, I want to tell you, in your charge to the jury of course you would tell them, with the limited purpose of its admissibility: that is, to show as it affects (R. 365) his inclination to work. That is the only purpose we can admit it for. But I have five cases here now in which we can show that. As your Honor knows, the jury already knows that, about his getting compensation. If you put that in, we just want to show the actual amounts he got, certified from the Veterans' Administration.

The COURT. You really haven't any hope, have you, that I will admit testimony of that kind? I wouldn't dream of doing it.

Mr. SPELL. Yes. I respect your Honor's opinion, but I should like to note an exception, if your Honor please.

The COURT. Of course you have an exception.

Mr. SPELL. Thank you, your Honor.

(At this point Mr. Miller approached the bench.)

Mr. MILLER. I might state, for the record, that we rely on 61 Federal 2d.

The COURT. You don't have to rely on anything in this court.

Mr. MILLER. Very well.

(At the conclusion of the foregoing conference, counsel returned to the trial table, and the trial proceeded as follows:)

(A certified record of compensation payments made in the case of Harry C. Cox was marked "Government Exhibit 12" for identification.)

Mr. SPELL. With your Honor's permission, I should like to have this document marked for identification and for the record to show that I offered it in evidence and that it was refused (R. 366).

The COURT. Well, the record already shows it, doesn't it?

Mr. SPELL. It had not been marked, your Honor.

The COURT. If you think it proper to discuss it any further, why——

Mr. SPELL. No, indeed. I just wanted it marked.

The COURT. That was all done before, here at the bench.

Mr. SPELL. Yes, your Honor.

The COURT. Any further testimony?

Mr. SPELL. The defendant rests, your Honor.

Mr. DAWSON. And the plaintiff rests.

Mr. SPELL. At this time I should like to renew my motion.

The COURT. Well, just a minute. Do you both rest?

Mr. SPELL. Yes.

Mr. DAWSON. Yes. We both rest, your Honor.

The COURT. All right. Now, wait a minute. The jury is excused until 10 o'clock Monday morning.

(Thereupon the jury left the courtroom.)

GOVERNMENT'S MOTION RENEWED

Mr. SPELL. May it please the Court, at this time I should like to renew my motion.

The COURT. Yes, sir.

Mr. SPELL. I respectfully renew the motion I made at the close of the testimony for the plaintiff and ask this Court to direct this jury to bring in a verdict for the Government and against the plaintiff, on the ground that the plaintiff has failed to establish that he became permanently and totally disabled (R. 367).

The COURT. You mean failed to offer evidence tending to show, which the jury can believe?

Mr. SPELL. Yes, your Honor.

The COURT. All right. There is a very great difference.

Mr. SPELL. Yes. That he became permanently and totally disabled during the life of the insurance contract here in suit upon. That is the ground for my motion.

The COURT. Now, gentlemen, of course the legal situation has not changed at all, and the Court has had no reason to change its opinion. The Court cannot grant the motion.

DISCUSSION OF PRAYERS (R. 368)

* * * * *

The COURT. I cannot grant the ninth prayer. The ninth prayer indicates that there is serious evidence in the case that he could do clerical work, for instance. He has not education enough to do it, under the evidence.

Mr. SPELL. Your Honor should add, if I may say so, he had four years and three months studying to be an office assistant, in Strayer's Business College.

The COURT. But he did not have education enough to do it. He could not pursue it, didn't know what it was all about.

Mr. SPELL. For a long time he did, your Honor. He was bound to learn something, or they would have kicked him out of it long ago. He has been in it three years.

The COURT. I was in Congress for nearly 20 years, I have had a great many of these cases, and I know something about

vocational training and what it amounts to and what it amounted to during the time, and I know a great deal about how the Veterans' Bureau was run.

Mr. SPELL. Your Honor, I should like to show you that statement he wrote to Mr. McClaine, and let's see whether you think he is an intelligent man or not.

The COURT. How is that?

Mr. SPELL. That letter he wrote to Mr. McClaine about deducting the compensation.

The COURT. I haven't said he was not intelligent.

Mr. SPELL. Well, he is a man of education (R. 383).

The COURT. I did not say he was not intelligent. I said the evidence shows that he would not have sufficient formal education to qualify in a clerical capacity. That is all I say. A man may have all kinds of sense before he dies. There is a man in Carolina County who couldn't read and write, as far as that is concerned, made all the money from us.

Mr. SPELL. I would like you to look at the composition of that letter, your Honor. It shows very good thought, expresses himself very well.

Mr. DAWSON. Just to keep the record straight, Mr. Cox didn't write that letter. All he did was sign his name. Now, I want to keep the record straight on that.

Mr. SPELL. I don't know whether it is shown who wrote the letter, your Honor. Mr. Cox signed it. He is presumed to have dictated it or knew what was in it. There is no evidence that he didn't write it.

The COURT. The Court does not think the evidence in the case justifies the ninth prayer. And there is no evidence to justify the tenth prayer. There is no evidence that he has neglected himself physically. * * * (R. 384).

* * * * *

CLOSING ARGUMENT TO THE JURY ON BEHALF OF PLAINTIFF

* * * * *

Furthermore, there isn't a physician that the Government could call who would testify that a man having once had a mitral regurgitation but what that condition would be permanent and be as our doctors, both of them, testified to. The

only thing I can say about our friend, Dr. Connor, upon whom Mr. Spell strongly relies, is the fact that there were so many men under examination at the time he examined Mr. Cox that he simply didn't make an examination of this man. Anybody who is a doctor at all, who owns a stethoscope, can find a mitral regurgitation, and you don't have——

Mr. SPELL. I object to that.

The COURT. That is true.

Mr. SPELL. Well, your Honor, he said that the didn't examine the man.

The COURT. The man had a mitral regurgitation before he went in the Army. The evidence in this case states that it is well known that if a man has a mitral regurgitation and a competent physician examines his chest, he will hear the mitral murmur. I don't think Mr. Dawson has gone outside the realm of legitimate argument.

Mr. SPELL. May I have an exception to your Honor's ruling?

The COURT. Yes (R. 430).

The following prayers for instructions to the jury were granted:

PLAINTIFF'S PRAYERS

You are instructed that the definition of the term "total disability" as contemplated by law with respect to the contract upon which this suit is instituted is any impairment of mind or body which renders it impossible for the disabled person to follow continuously any substantially gainful occupation, and that such "total disability" shall be deemed to be permanent whenever it is founded upon conditions which shall render it reasonably certain that it will continue throughout the life of the person suffering from it.

* * * * *

The term "total disability" does not mean that there must be proof of absolute incapacity to do any work at all. It is enough if there is such impairment of capacity as to render it impossible for the disabled person to follow continuously any substantially gainful occupation (R. 438).

* * * * *

You are further instructed that intermittent irregular employment by the plaintiff and the receipt of reasonable compensation therefor is not, in and of itself, conclusive evidence of a lack of total and permanent disability, entitling the plaintiff to recover, but is to be considered only in connection with the other testimony in the case in determining whether or not said total and permanent disability did exist (R. 439) on May 1, 1927.

* * * * *

If you are satisfied from all the evidence that the plaintiff became totally and permanently disabled, as claimed, on May 1, 1927, as that term has been defined to you in these instructions, it was not necessary for him to make any further payment of premiums after so becoming totally and permanently disabled. Further, the fact that the plaintiff received from the defendant sums of money to which he was entitled by law other than insurance monies does not effect his right to recover under the insurance contract in question, if he is entitled to so recover.

* * * * *

If you are satisfied from all the evidence that the plaintiff became totally and permanently disabled as claimed on May 1, 1927, as that term has been defined to you in these instructions it was not necessary for him to make any further (R. 440) payments of premiums after so becoming totally and permanently disabled.

* * * * *

You are instructed that the mere fact that plaintiff may have worked for limited and irregular periods during the time when he claims to have been permanently and totally disabled is not conclusive against him. The question is not whether he worked or did not work, but whether he was able to work, that is, whether he was able to follow continuously some substantially gainful occupation without material injury to his health, or at the risk of aggravating his condition.

* * * * *

The term "total disability" does not mean that there must be proof of absolute incapacity to do any work at all. It is

enough if there is such impairment of capacity as to render it impossible for the disabled person to follow continuously any substantially gainful occupation (R. 441).

* * * *

You are instructed that the cause of disability or disease is immaterial if you find plaintiff permanently and totally disabled while his insurance was in force (R. 442).

* * * *

DEFENDANT'S PRAYERS

If you find that the plaintiff ceased to pay his insurance premiums at a time when he was able to engage with reasonable regularity in any substantially gainful occupation, then your verdict must be for the defendant.

* * * *

If you find that the disability from which the plaintiff suffered at the time of the last premium payment will continue throughout the remainder of his life, but if at the same time you find that such disability does not prevent him from engaging in some substantially gainful occupation with reasonable regularity, then your (R. 443) verdict must be for the defendant.

* * * *

In considering the testimony as to the plaintiff's disability, the government's records of the physical examinations made and the diagnoses found by the government doctors are to be given the same weight as though the doctors had personally appeared and testified in court. * * * (R. 446.)

CHARGE TO THE JURY

The COURT (GOLDSBOROUGH, J.). Madam, and gentlemen of the jury, the Court thinks that the law in this case has been adequately covered by the instructions granted by the Court to counsel for the plaintiff and counsel for the Government.

It is only necessary for me to call your attention to the fact which I am sure you already know from your service with other juries. The burden of proof is upon the plaintiff,

which means that the plaintiff must establish by the preponderance of the evidence, which, in turn means in plain language, that the evidence sustaining the plaintiff's claim is more satisfactory to you than the evidence contradicting his claim.

Now, you may retire and consider the case.

(Thereupon at 12 o'clock, noon, the jury retired to consider of their verdict.) (R. 437.)

Defendant's requested instructions to the jury Nos. IX and XIV, as follows, were denied:

IX

If you find that the plaintiff has been unable because of his condition to engage continuously in any substantially gainful occupation requiring physical labor or exertion, but believe that he could follow a substantially gainful supervisory or managerial occupation with reasonable regularity, then your verdict must be for the defendant (R. 445).

XIV

You should give the same weight to evidence of work of a supervisory or managerial nature as is given to evidence of work requiring physical exertion (R. 447).

Law No. 88251

HARRY C. COX, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

FINAL JUDGMENT

This cause came on for trial before the Court and a jury, and it appearing that war risk term insurance contract issued by the United States Government to Harry C. Cox in the amount of ten thousand dollars (\$10,000.00) was in full force and effect through the month of May 1927, and after consideration of the evidence, the case having been submitted to the jury and a verdict having been returned in favor of the plaintiff, finding him to have been totally and permanently disabled on May 1, 1927, it is this 19th day of December 1940

Ordered and adjudged that plaintiff, Harry C. Cox do have and recover from the defendant, the United States of America, monthly installments of insurance at the rate of Fifty Seven Dollars and Fifty Cents (\$57.50) per month commencing May 1, 1927. And it is further

Ordered and adjudged that Warren E. Miller and C. L. Dawson, attorneys for plaintiff, are entitled to recover as a reasonable attorneys' fees, ten per centum (10%) of the sum for which judgment is given, the said ten per centum (10%) to be deducted from the amount paid under the judgment and paid to plaintiff's attorneys as attorneys' fees herein, which are hereby allowed.

And it is further

Ordered and adjudged, that Warren E. Miller and C. L. Dawson, attorneys for the plaintiff are entitled to recover as a reasonable attorneys' fee herein, ten per centum (10%) of all future payments of insurance hereafter made under the insurance contract herein sued upon.

T. ALAN GOLDSBOROUGH.

(205)

FILED MAY 24 1941

Joseph W. Stewart

CLERK

No. 7876

**In the United States Court of Appeals
for the District of Columbia**

UNITED STATES OF AMERICA, APPELLANT

v.

HARRY C. COX, APPELLEE

**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA**

BRIEF FOR THE APPELLANT

JULIUS C. MARTIN,

Director, Bureau of War Risk Litigation.

WILBUR C. PICKETT,

Special Assistant to the Attorney General.

KEITH L. SEEGMILLER,

Attorney, Department of Justice.

INDEX

	Page
Jurisdiction.....	1
Statement of the case.....	1
Points relied upon.....	2
Summary of argument.....	3
Argument.....	5
I. There was no substantial evidence to show that the plaintiff became totally permanently disabled on May 1, 1927....	5
A. Summary of the evidence.....	5
B. Discussion.....	15
II. The court erred in excluding expert testimony offered by defendant regarding the significance properly attributable to diagnoses of plaintiff's condition. The prejudicial effect of excluding this testimony was aggravated by the fact that testimony of the same character had been adduced by plaintiff.....	18
III. The court erred in denying defendant's requested instruc- tions Nos. IX and XIV.....	25
IV. Indications of partiality and bias on the part of the District Court, favorable to plaintiff and adverse to defendant, deprived defendant of a fair trial.....	28
Conclusion.....	34

CITATIONS

Cases:

<i>Alabama Title and Trust Co. v. Millsap</i> , 71 F. (2d) 518.....	17
<i>Becker v. Miller</i> , 7 F. (2d) 293.....	17
<i>Chesapeake and Ohio Ry. v. Martin</i> , 283 U. S. 209.....	17
<i>Crook v. International Trust Co.</i> , 32 App. D. C. 490.....	33
<i>Deadrich v. United States</i> , 74 F. (2d) 619.....	18
<i>Economon v. Barry-Pate Company</i> , 3 F. (2d) 84.....	33
<i>Evgen v. United States</i> , 58 F. (2d) 616, 620 (C. C. A. 8th).....	18
<i>H. Herfurth, Jr., Inc. v. United States</i> , 85 F. (2d) 719.....	24
<i>McKibben v. Philadelphia & R. Co.</i> , 251 Fed. 577.....	33
<i>Mattox v. United States</i> , 146 U. S. 140.....	33
<i>Quercia v. United States</i> , 289 U. S. 466.....	28
<i>Smith v. United States</i> , 5 Fed. Supp. 475.....	17
<i>Southern Pacific Co. v. Klinge</i> , 65 F. (2d) 85.....	33
<i>Sprinkle v. Davis</i> , 111 F. (2d) 925.....	33
<i>United States v. Barry</i> , 67 F. (2d) 763, certiorari denied, 292 U. S. 648.....	17, 18
<i>United States v. Chemical Foundation</i> , 272 U. S. 1.....	17
<i>Warren Live Stock Co. v. Farr</i> , 142 Fed. 116.....	24
<i>Weaver v. United States</i> , 72 F. (2d) 20.....	17

Statute:

Sec. 19, World War Veterans' Act (38 U. S. C. 445).....	1
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In the United States Court of Appeals for the District of Columbia

No. 7876

UNITED STATES OF AMERICA, APPELLANT

v.

HARRY C. COX, APPELLEE

*APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA*

BRIEF FOR THE APPELLANT

JURISDICTION

This suit is upon a claim for yearly renewable term insurance denied by the Administrator of Veterans' Affairs prior to the institution of suit. It was timely brought under the provisions of Section 19 of the World War Veterans' Act (38 U. S. C. 445). (Supp. 21.) The judgment appealed from was entered on December 19, 1940. (Supp. 205.) Notice of appeal was filed on January 6, 1941. (R. 459.)

STATEMENT OF THE CASE

The appellee, Harry C. Cox, plaintiff in the court below, seeks to recover total permanent disability benefits under a contract of yearly renewable term insurance. For lack of premium payment, insurance protection under the policy sued on terminated on July 1, 1927, and the only issue presented in the District Court was raised by defendant's denial of plaintiff's allegation that he became totally permanently disabled on May 1, 1927. The judgment appealed from rests upon a verdict favorable to plaintiff upon that issue.

Reversal of the judgment is sought upon the grounds:

(1) That there is no substantial evidence to support the verdict and that, accordingly, denial of defendant's motion for a directed verdict (Supp. 199) and for judgment notwithstanding the verdict (R. 455) was error.

(2) That the court erred in rulings during the progress of the trial in (a) excluding certain expert testimony offered by the defendant, and (b) denying defendant's prayers for instructions to the jury Nos. IX and XIV.

(3) That the comments and attitude of the trial judge had the effect of indicating partiality and bias on the part of the court favorable to plaintiff and against the defendant, preventing a fair trial.

A detailed statement of the evidence is set forth hereinafter under the heading "Summary of the Evidence", as a basis for the discussion concerning the lack of substantial evidence. The evidence excluded, the instructions denied, and the comments and conduct of the trial judge having the effect of indicating prejudice, are set forth in detail hereinafter in connection with the discussion, respectively, of each of those matters.

POINTS RELIED UPON

I

There was no substantial evidence to show that the plaintiff became totally permanently disabled on May 1, 1927. (See motion for directed verdict and denial thereof. (Supp. 199.))

II

The court erred in excluding expert testimony offered by defendant with respect to the significance properly attributable to conditions diagnosed by other doctors, particularly since expert testimony of the same character had previously been adduced by plaintiff. (See rejection of the testimony of Dr. Foxwell. (Supp. 181-184.))

III

The court erred in ruling that there was no evidence in the case warranting an instruction to the jury that managerial

and supervisory work might constitute a substantially gainful occupation, and in denying defendant's requested instructions designed to invite the jury's attention to the significance properly attributable to evidence showing plaintiff's performance and ability to perform managerial and supervisory work. (See defendant's prayers for instructions to the jury Nos. IX and XIV (Supp. 204), and the court's rejection of them (Supp. 199)).

IV

The record contains many instances of actions having the effect of indicating partiality and bias on the part of the District Court favorable to plaintiff and adverse to defendant, which likely influenced the jury and therefore deprived defendant of a fair trial (plain error subject to review and correction on appeal although not specifically raised in the court below).

SUMMARY OF ARGUMENT

I

There was no substantial evidence to show that the plaintiff became totally permanently disabled on May 1, 1927. In the light most favorable to the plaintiff, the evidence shows that for a number of years prior to May 1, 1927, and for at least ten years thereafter, the plaintiff was found, upon each of the many medical examinations of him, to have no disability other than moderate psychoneurosis. There is undisputed evidence that moderate psychoneurosis is not substantially disabling. A heart condition, diagnosed in 1918 and 1919 and then not more than 25% disabling—assuming in plaintiff's favor that those diagnoses were correct—was in fact so mild thereafter that it was not detected upon any of the many medical examinations of the plaintiff until 1940.

The plaintiff actually pursued substantially gainful occupations, principally of a supervisory and managerial nature, from 1927 to the date of trial, under circumstances conclusively negating any inference—if such inference were otherwise permissible—that he was totally permanently disabled prior to the performance of such work. If the evidence war-

rants a conclusion that the plaintiff had become totally permanently disabled at the time of trial, it is solely because of diseases presently existing which had their inception years after the termination of insurance protection under the policy sued on.

II

The court erred in excluding the testimony of Dr. Foxwell with respect to the extent of disability shown by the diagnoses of other doctors, appearing in reports of examinations. Expert interpretation of these diagnoses for the benefit of the jury was proper. In any event, they had been interpreted extensively by plaintiff's expert witness in the same manner sought to be employed by defendant. The prejudicial effect of excluding this testimony was accentuated by the court's statement, in effect, that certain other testimony of Dr. Foxwell was erroneous as a matter of common knowledge.

III

The court erred in failing to instruct the jury, although requested by defendant to do so, that evidence showing the performance by the plaintiff, or an ability to perform work of a supervisory or managerial nature would refute a claim of earlier total permanent disability. These instructions were refused upon the ground that there was no evidence in the case to which they could be applicable since there was nothing to show that the plaintiff could perform work of that character. In effect, the view of the court was that, as a matter of law, the evidence showed that the plaintiff was incapable of performing any work except manual labor, and the only question for the jury's consideration was whether he could perform manual labor. There is an abundance of evidence to show that the plaintiff is an intelligent person who has apparently overcome the handicap of limited formal education, and is capable of rendering valuable service as a business manager and as a supervisor of the work of others. The defendant was entitled to have the attention of the jury invited to the significance of such evidence.

IV

Throughout the trial, there were actions having the effect of indicating partiality and bias on the part of the trial court favorable to plaintiff and adverse to defendant. It is probable that these indications of partiality on the part of the court influenced the jury in their consideration of the case, so that defendant was deprived of a fair trial. But, in any event, the verdict should be set aside and a new trial granted because of the presence of this extraneous influence during the jury's consideration of the case. The jury will be presumed, without proof, to have been influenced by it to find against the defendant.

ARGUMENT

I

There was no substantial evidence to show that the plaintiff became totally permanently disabled on May 1, 1927

A. Summary of the evidence.

The plaintiff testified that about 1927 or 1928 he engaged in the business of painting and paperhanging because a number of his friends asked him "to supervise" work of that character for them. (Supp. 60.) On direct examination he testified, in effect, that his papering and painting business had not been a source of substantial income, but had been "just a pastime more than anything else". (Supp. 34.) Later he characterized this business as including just little odd jobs not wanted by other contractors. (Supp. 73.) Upon cross-examination, however, he admitted that by 1929 he was holding himself out as a paperhanger and painter because "I had to make a living somewhere" (Supp. 60), and he testified that he had done a little work of that character "all along" from about 1927 to the date of trial in an effort to "do the best and try to make a living in a decent way" (Supp. 73).

He testified that he had no records of his business and he denied any ability to recollect, even as the basis for an estimate, either the number of contracting jobs he had undertaken

in the aggregate or in any one year since 1927, or the amount of profit or loss resulting from any or all of them (Supp. 60-61), except that with respect to one particular job he testified he had lost money (Supp. 71). Interrogated respecting a prospective job for which negotiations were in progress at the time of trial, the plaintiff testified, in effect, that it would be of little consequence if he got it because so far as he was concerned there were only a few windows to paint—"The other work is to be done by inexperienced men". (Supp. 68.)

Questioned specifically with respect to each of them, the plaintiff admitted on cross-examination that he had done work for Mr. Paine (Supp. 61), Mrs. Groves, Mr. Scanlon (Supp. 63), Mr. Poole, Mr. Willet (Supp. 66), Mr. Pickett (Supp. 65), Mr. Mason (Supp. 64), Mr. Grigsby (Supp. 68), Mr. McLaine (Supp. 72), Mr. Smith (Supp. 76), Mr. Lunsford (Supp. 64), and Mrs. Stuart (Supp. 69). Of these, it was shown that Grigsby, McClaine, Mason, Smith, and Lunsford were commercial building contractors in the business of constructing residences for sale on a competitive market, and that the plaintiff's business relationship with them was that of sub-contractor. In that capacity, he performed papering and painting contracts for each of these men as follows:

- 1938----- Four residences for Grigsby, \$900.00.
- 1939-1940----- Three residences for McClaine, \$674.00, and one apartment house for McClaine, \$1,450.00.
- 1938, 1939, and 1940-- Approximately five houses per year for Mr. Mason at \$100.00 per house. With the exception of one house, plaintiff had done all of Mason's papering and painting during the three years preceding the trial.
- July and August 1940-- A number of houses for Mr. Smith, \$500.00.
- September 1940----- One house for Lunsford, \$300.00.

At the time of trial, Lunsford was assisting plaintiff in negotiations for more work, not on the basis of sympathy or friendship, he testified, but solely because the plaintiff does good work. (Supp. 158-159, 160.)

The work performed for Mrs. Stuart was done in June 1940, and the amount paid for it was \$250.00. As to the dates upon which other work was performed and the amounts which plaintiff received for it, no definite evidence was introduced.

The plaintiff testified that he did little of the actual painting or papering himself, but restricted his efforts to the supervisory and managerial phases of the business. Of the several witnesses testifying as to the nature of plaintiff's participation in this business, the testimony of Mr. Mason, the plaintiff's witness, is typical. Mr. Mason testified:

Q. Now during that period of time, Mr. Mason, have you had occasion to observe Mr. Cox's physical condition during the last three and a half years that you have known him?—A. Well, he has never done any work for me himself. He has men to do it for him.

Q. Well, have you been at your places, at the houses that you build, when they were working on that place?—A. I have; most of the time.

Q. Did you ever see Mr. Cox do any work himself?—A. No, sir. (Supp. 99.)

* * * * *

Q. Does he supervise the work himself?—A. Yes, sir.

Q. Is he there fairly regularly?—A. Most of the time.

Q. Is his work satisfactory to you?—A. It is.

Q. Do you hold Mr. Cox responsible for the jobs?—A. I do.

Q. Do you pay money directly to Mr. Cox?—A. Yes, sir. (Supp. 100–101.)

* * * * *

Q. Mr. Mason, when was the last job he did for you?—A. Three weeks ago.

Q. Where was that job located, Mr. Mason?—A. 720 North Edgewood Street, in Arlington.

Q. Do you know whether Mr. Cox had any other job on at the same time?—A. I think he did. (Supp. 101.)

All other witnesses interrogated in this respect gave substantially similar testimony. (Supp. 61, 63, 65, 66, 68, 70, 72, 89, 149, 158, 161, 165.) JOHN M. HARRIS plaintiff's witness who had been employed as a painter by the plaintiff,

testified that the plaintiff did none of the work but that "he got ten percent on the work and we do the work". (Supp. 86.)

During each of nine years from 1927 to 1936, the plaintiff was employed periodically as substitute mail carrier and as an extra helper in the post office at Ballston, Virginia, during the Christmas rush. This work required the use of his automobile to distribute mail over a rural route of approximately 30 miles. In each instance, payment for the use of his car, and payment for his services, were made upon separate vouchers. The days which he worked and the amount received for service, exclusive of payments for the use of his car, were as follows:

	Days	
1927-----	7	\$36. 96
1928-----	6	30. 00
1929-----	69	329. 24
1930-----	25	108. 75
1931-----	20	106. 03
1932-----	32	132. 34
1933-----	49	214. 97
1934-----	35	144. 35
1935-----	24	120. 00
1936-----	15	90. 00
(Supp. 149-154.)		

This work ended in 1936 when, upon reorganization of the postal service, the Ballston Post Office was closed and the rural route over which plaintiff carried mail was discontinued. (Supp. 57.)

SIDNEY H. SMITH, regular mail carrier for whom the plaintiff substituted, testified that before employing plaintiff he had experienced some difficulty in obtaining a substitute on short notice for short periods of work, and that although there were occasions upon which the plaintiff did not work when he was asked, "after I had Mr. Cox, I had him the rest of the time that I was at Ballston and had no other trouble and no reason to look for another substitute." (Supp. 91.)

In August 1926, the plaintiff purchased a truck which he owned until it was replaced with a new one in 1932. He still owned this second one at the time of trial. The operation of these trucks in commercial hauling by an employee under

plaintiff's supervision had provided him an average net income of not less than \$15.00 per month from August 1926 to the date of trial. (Supp. 49-51.) The plaintiff testified that it had been \$15.00 or \$20.00 a month. (Supp. 48.)

Plaintiff's witness, JOHN PFLEIGER, former proprietor of a grocery store, testified that from 1930 to 1935 the plaintiff worked in his grocery store on week-ends (Supp. 136-137), performing satisfactory work necessary to the conduct of his business; that the work which plaintiff performed was worth \$5.00 per week to him; and that he had actually paid the plaintiff that amount, usually in merchandise upon the basis of cost rather than retail prices (Supp. 136, 138). This witness further testified that for eighteen years he had been, and still was, a close personal friend of the plaintiff; that during the time he worked in the grocery store he appeared to be a healthy man, although he had kind of a quick temper and "He used to get little spells and get in the back room and when he got all right he would come out and wait on store trade again for a while". (Supp. 135.) Mr. Pfeiger further testified that his employment of the plaintiff terminated solely because he closed his store and went out of business. (Supp. 138.)

Stating initially that he had not worked for Mr. Pfeiger, plaintiff explained upon further cross-examination that he did not receive money for working for him, but that he had received groceries in return for such services as waiting on trade, running errands, taking money to the bank, opening the store in the mornings, particularly on stormy days because Mr. Pfeiger lived so far from the store, and staying at the store on other occasions in Mr. Pfeiger's absence. (Supp. 135.) Apparently, during such absences of Mr. Pfeiger, plaintiff assumed managerial responsibility at the store since, although there were five other employees (Supp. 135), plaintiff was called upon to open the store, and he testified, "He would ask me to come to the store and stay and watch the men around the place or watch after things for him." (Supp. 59.)

Since 1926, the plaintiff has lived in, and has had general supervision over, a house in Ballston, Virginia, property of

the undivided estate of his father. One May Clem has conducted a boarding house there for a number of persons, including the plaintiff and some of the time his mother (Supp. 44-45), providing board to the plaintiff, and presumably to his mother, as compensation for the use of the house (Supp. 74).

From about 1929 (Supp. 50), plaintiff has owned and driven a touring car. He testified that he had driven an average of about 5,000 miles per year, and that on one occasion some 3 or 4 years prior to trial, he had driven an automobile most of the distance from Ballston, Virginia, to Miami, Florida, within a period of 36 hours (Supp. 53). Upon his representations that he had no physical or mental impairment affecting his ability to drive an automobile, he has obtained operator's permits from year to year. (Supp. 154-157).

The most recent medical examination of the plaintiff prior to May 1, 1927—the date upon which he claims to have become totally permanently disabled—was made on January 15, 1926. The diagnosis at that time was hysteria. The examiner noted a continuance of marked emotional reaction to treatment, which had been observed on earlier occasions. (Supp. 16.) The earliest medical examination of the plaintiff subsequent to the claimed date of total permanent disability was made in March 1928. The diagnosis was pulmonary tuberculosis, chronic, minimal, arrested; psychoneurosis, hysteria, moderate. (Supp. 16-17.) Reports of examinations made of the plaintiff thereafter show his condition to have been as follows:

- March 14, 1929----- Laryngitis, chronic; aphonia, partial; pulmonary tuberculosis, minimal, apparently cured; psychoneurosis, moderate degree. (Supp. 17.)
- October 15-17, 1929-- Neurasthenia, moderate degree, neurocirculatory type; laryngitis, chronic, moderate; pulmonary tuberculosis, chronic, minimal, apparently cured. (Supp. 18.)
- December 2, 1930---- "He may be an early case of hypertension but I am inclined to believe part of his pressure at this time is due to emotional tension." Diagnosis: Neurocirculatory asthenia, moderate degree. (Supp. 18.)
- August 25, 1932----- Psychoneurosis. (Supp. 19.)
- April 22, 1936----- Psychoneurosis, mixed type, moderate; laryngitis, chronic, mild; hypertension, moderate; history of pulmonary tuberculosis. (Supp. 19.)

June 8, 1936----- Psychoneurosis, mixed type, moderate. (Supp. 19.)
 October 29, 1936----- Psychoneurosis, neurasthenia, moderate; hypertension, moderate; laryngitis, chronic, hypertrophic, moderate; tonsillar tags, bilateral. (Supp. 19-20.)
 October 29, 1936----- Psychoneurosis, neurasthenia, moderate; hypertension, moderate.
 November 23, 1936-- No respiratory disease found; hypertension, moderate. (Supp. 194.)

Dr. RAYMOND K. FOXWELL testified that hysteria and neurasthenia are classes or subdivisions of psychoneurosis; that psychoneurosis is usually regarded as curable; and that employment, in the patient's usual occupation if possible, is an important factor in the treatment of psychoneurosis. (Supp. 176, 177.) In this respect, the testimony of Dr. Guynn, neuropsychiatric expert for the plaintiff, is in substantial accord with the testimony of Dr. Foxwell. (Supp. 128-129.)

On April 9, 1919, a medical examiner of the plaintiff found some evidence that he had active pulmonary tuberculosis (Supp. 7), and on April 16, 1919, pulmonary tuberculosis, regarded by the examining physician as constituting total temporary disability, was diagnosed and "full anti-tubercular treatment, preferably sanitorial" was recommended (Supp. 11). Tuberculosis, diagnosed as pulmonary again in 1922 (Supp. 13), and tuberculosis of the larynx in 1923 (Supp. 14), had become permanently arrested by April 1924 since on that date a special chest examination resulted in findings of "No evidence of active tuberculosis at the time of this examination" (Supp. 15), and no activity was ever diagnosed thereafter.

The temporary existence of active tuberculosis, indicated by the foregoing diagnoses, is also indicated by plaintiff's testimony relating to that period of time. He testified that in the spring of 1919 he was employed by the DuPont Company as a yard foreman and timekeeper (Supp. 24), and that from later in the spring of 1919 to the fall of 1922 he attempted to follow a course in vocational training to become a bookkeeper and stenographer, but that his health prevented his carrying on in either of these undertakings (Supp. 25, 26). He described his condition during that period as "I was in such a condition that I couldn't travel * * * I was ner-

vous and weak, and my chest bothered me, and I just couldn't walk". (Supp. 26.) It was "a weak and nervous condition * * * couldn't do anything. If I tried to do anything I just give out. Q. Shortness of breath?—A. Yes, sir." (Supp. 29.)

Although plaintiff did not receive sanitorial treatment recommended in 1919, he testified that in accordance with medical advice he took proper care of himself at home with respect to rest, fresh air, and diet. (Supp. 35–36.) That he in fact refrained from work until it became certain that his tuberculosis was arrested appears from his further testimony that after 1922 he attempted no work at all except "little things around home" until he commenced work as a substitute mail carrier in 1927. (Supp. 29, 31.)

Prior to his discharge from the military service on June 18, 1918, medical examiners had diagnosed plaintiff's condition as valvular heart disease, mitral regurgitation, decrease in cardiac compensation subsequent to rheumatic fever, acute, and bronchitis, acute. (Supp. 3–4.) The medical officers who made this diagnosis regarded the disability by reason of this heart condition as 25% in view of his prewar occupation of wholesale distributor of bread.¹ (Supp. 5.) On August 23, 1918, Dr. Jones diagnosed plaintiff's condition as chronic endocarditis, with mitral regurgitation. He regarded the condition he found as being susceptible of arrest, stating in his report, after the recitation of certain treatment plaintiff had received, "In view of this fact, his disease will probably be arrested". (Supp. 6.)

On April 9, 1919, the condition was diagnosed as mitral regurgitation with broken compensation. (Supp. 7.) On April 4, 1924, Dr. Guynn, then employed as a neuropsychiatric expert by the Veterans' Administration, examined the plaintiff from the "standpoint of his nervous and mental condition". (Supp. 103.) While the report of that examination contains no diagnosis of any mental or nervous condition, it includes

¹ Prior to service, plaintiff had operated a number of teams and wagons in the business of selling and distributing bread. His income (apparently gross) had been approximately \$400.00 per month.

a diagnosis, among other minor ailments, of tachycardia, which meant, Dr. Guynn testified at the trial, rapid pulse. (Supp. 104.) Descriptive of the character of examinations which he makes, Dr. Guynn testified, "Every case I examine, I usually go over them physically and examine their heart, even though I am treating them for a nervous condition." (Supp. 124.)

Thereafter, until 1940, no heart condition was found upon any of the many medical examinations of the insured. Dr. Guynn had examined the plaintiff on March 14, 1929, and again on October 15, 1929, upon which occasions he made diagnoses, respectively, of psychoneurosis, moderate degree, and neurasthenia, moderate degree, neurocirculatory type. (Supp. 17, 105.) On these occasions, Dr. Guynn, one of a number of examiners signing the reports, made no notation of any heart condition, as he had done in 1924, but the report of a special heart examination on March 14, 1929 recites, "Heart: No murmurs, accentuations or arrhythmia" and "No cardiac disease found." (Supp. 190, 191.) At the trial, Dr. Guynn gave no testimony indicating a belief on his part that any degree of disability by reason of a heart condition was actually present in 1929.

A report of an examination dated October 24, 1924, recites with respect to the heart that there were no thrills or murmurs (Supp. 188), and on July 25, 1925, a special cardiovascular examination resulted in "Conclusion: No evidence of cardio-vascular disease" (Supp. 190). On December 4, 1930, it was found upon medical examination of the plaintiff that his heart sounds were regular and of good volume and tension, with no murmurs, no cyanosis, or dyspnoea observed after exercise, and no cardiac disease found. (Supp. 192, 193.)

Dr. GUYNN, now in private practice and appearing as a neuropsychiatric expert on behalf of the plaintiff, testified that upon his examination of the plaintiff on November 26, 1940 he found a general hardening of the arteries, including those leading to the brain, and particularly those leading to the eyes, indicating that the arteries of the heart were also hardening. (Supp. 110-111.) He thought the heart was "a

little enlarged to the left and a little downward", and that the heart sounds were "a little snappy", meaning "there is some disorder, I think, in this valve, but it's not a regurgitation; it's just a snappy sound". (Supp. 111.) He testified that fifteen hops on each foot "had given him a little more exhaustion than you would expect" (Supp. 111-112); that emotionally he is unstable, being easily excited and worried; and that his memory seemed to be faulty, although the plaintiff denied it (Supp. 112). He testified that, in addition to finding that plaintiff was then suffering from psychoneurosis, anxiety type, he made a diagnosis of general arteriosclerosis, moderate, arterial hypertension, severe, retinal arteriosclerosis, primary optic atrophy, valvular heart disease, mitral stenosis, and mitral regurgitation, with partial decompensation and possibly renal involvement. (Supp. 112.)

The doctor further testified that mitral stenosis means that the valve of the heart is not normal; that it frequently becomes unelastic (Supp. 113); that mitral regurgitation is not curable in the sense that an injured valve is restored to normalcy (Supp. 119, 120); and that in 1940 plaintiff's heart condition was "rather marked" (Supp. 126) and of "severe degree" (Supp. 127), so that extended examination, X-ray, or electrocardiographic examinations were wholly unnecessary to arrive at a proper diagnosis (Supp. 124). This witness testified to opinions, in effect, that in 1940 it would have been unwise for the plaintiff to have engaged in strenuous manual work (Supp. 115), and that, with respect to mental work, he could not concentrate "continuously enough to hold a full-time position" (Supp. 116).

Plaintiff's witness, DR. JAMES J. WHISMAN, a general practitioner, testified that upon his examination of the plaintiff during and subsequent to June 1940, he found the plaintiff "had very high blood pressure; his heart was enlarged, dilated; he had what we term a general conjunctive heart failure * * * His ankles were very swollen". (Supp. 139.) "He was suffering, in my opinion, with cardiac vascular renal disease, hypertension, and decompensation." (Supp. 140.) "Cardiac vascular renal disease is a condition wherein the

heart and the blood vessels and the kidneys are affected; where there is failure of the heart and blood vessels and the kidneys to function." (Supp. 142.) "In coming to the conclusion, it is such a well-defined picture with shortness of breath, swelling of the ankles and enlargement of the liver, and elevation of the blood pressure; these help me to come to my conclusion. That is all part of the general picture. It is not a difficult diagnosis. It is not one that ordinarily calls for a great deal of technical or laboratory work to confirm it." (Supp. 145.) "I advised Mr. Cox to go home and go to bed and stay in bed. * * * His condition is very serious." (Supp. 141.) "It is against my advice that he is here today." (Supp. 147.)

The plaintiff testified that he had felt weak and nervous most of the time since his discharge from the military service and that, so far as he could tell, his condition, including pains in his chest and his nervousness, had been about the same since 1918. (Supp. 36-37.)

ROBERT CLEM, a border at the plaintiff's home during the six years prior to the date of trial, testified that during that time "I saw him pass out many times. * * * I seen him when he would go out * * * in the truck with some men and I would have to go home with him * * * he looked to me he was feeling bad and he went to bed." (Supp. 92.)

JOHN M. HARRIS testified that upon occasions between 1928 and 1940 he had seen the plaintiff when he had "passed right out * * * Like a faint." He usually "went on to sleep and he came to in a little while and stayed there quite a while before he got up." Twice in 1939, this witness testified, he had to "drive his car home for him" where he "passed right out". (Supp. 84, 85.)

B. Discussion.

The earliest time at which the plaintiff was found, upon medical examination, to have any physical or mental impairment which might reasonably be regarded as rendering him totally permanently disabled, was during and subsequent to the month of June 1940. Periodically throughout the 13-year period intervening between June 1940 and May 1, 1927—the

date upon which he claims to have become totally permanently disabled—and for a number of years prior to 1927, medical examiners found that he had no disability other than moderate psychoneurosis, and mild or moderate laryngitis. This was shown by reports of medical examinations of the plaintiff made by Government doctors, most of which were introduced by the plaintiff. (Supp. 2-21.)

The plaintiff claims—and it may be assumed in his favor that the inference is permissible—that he also had some degree of permanent damage to his heart subsequent to 1918 and 1919, when he was found to have a condition diagnosed as mitral regurgitation. Disability as a result of the condition thus diagnosed was never shown to have been regarded as more than 25%. It is plain, we submit—and the plaintiff presumably will not contend to the contrary—that neither such mitral regurgitation alone, nor in combination with a moderate psychoneurosis, rendered him totally permanently disabled.

A more serious condition was found by medical examiners in 1940, that is, general arteriosclerosis, moderate; severe hypertension; retinal sclerosis; optic atrophy; and renal involvement. But these conditions must be regarded as having developed during the four-year period from 1936 to 1940, during which the plaintiff is not shown to have been examined, and to have had their inception long subsequent to 1927. Hypertension, suspected only in 1930 (it was then noted that "He may be an early case of hypertension" (Supp. 18)), was found to be moderate in 1936. Plaintiff's evidence is that it had progressed to a degree far more disabling by 1940. The evidence shows a total absence in 1936 and prior thereto of any of the other conditions listed above, which were first diagnosed in 1940.

Since it was shown by plaintiff that the conditions found in 1940 were so marked that they could not be overlooked upon any ordinary physical examination, he relies upon the theory that the reports of medical examinations of the plaintiff in 1936, and prior thereto—official Government records—should be disregarded as mere fabrications and untrue upon

the theory that the doctors signing these reports had not, in fact, examined the plaintiff, although they purported to have done so. This was plaintiff's view, as presented to the jury.² These medical reports, presumptively correct because of presumptive regularity of the official conduct of public officers³ are not inconsistent with any other evidence in the case since acceptance of them as truly reflecting the condition of the insured's health as of the dates to which they have reference can be harmonized with the same acceptance of all other evidence. The jury may not arbitrarily disregard evidence thus presumptively correct and accurate and not in conflict with any opposing evidence. *Chesapeake and Ohio Ry. v. Martin*, 283 U. S. 209, 216; *Beeker v. Miller*, 7 F. (2d) 293, 295 (C. C. A. 2nd); *Alabama Title and Trust Co. v. Millsap*, 71 F. (2d) 518, 520 (C. C. A. 5th); *Smith v. United States*, 5 Fed. Supp. 475, 481 (D. C. Ky.).

Certainly, the existence of a substantial degree of physical impairment in 1940 is entirely consistent with its non-existence in 1927, so that neither the diagnoses indicating little disability at the earlier date, nor the diagnoses indicating substantial disability at the later date, need be regarded as erroneous.

Moreover, contemporaneously with the findings by medical experts to the effect that plaintiff's physical condition was compatible with his pursuit of a substantially gainful occu-

²In argument to the jury, counsel for plaintiff stated his theory as follows:

The only thing I can say about our friend, Dr. Connor, * * * is the fact that there were so many men under examination at the time he examined Mr. Cox that he simply didn't make an examination of this man. Anybody who is a doctor at all, who owns a stethoscope, can find a mitral regurgitation. (Supp. 200-201.)

Dr. Connor, cardiac specialist, had signed an examination report in his capacity as a Government official, to the effect that, upon special heart examination of the plaintiff on March 13, 1928, he had found no cardiac disease. (Supp. 190.)

³*United States v. Chemical Foundation*, 272 U. S. 1, 14-15; *Weaver v. United States*, 72 F. (2d) 20, 22 (C. C. A. 4th); *United States v. Barry*, 67 F. (2d) 763, — (C. C. A. 6th), certiorari denied, 292 U. S. 648.

pation, he was, in fact, pursuing substantially gainful employment. There is no evidence which cannot be reconciled with the view that, at least until 1936, the plaintiff's disability was only partial by reason of hypertension having its inception in 1930; psychoneurosis, the best treatment for which is employment; and a heart disability of 25% or less. No opposing view is more than equally consistent with the evidence, and evidence lending equal support to two inconsistent hypotheses has no tendency to establish either.

United States v. Barry, 67 F. (2d) 763, 765 (C. C. A. 6th), certiorari denied, 292 U. S. 648

Evgen v. United States, 58 F. (2d) 616, 620 (C. C. A. 8th)

Deadrach v. United States, 74 F. (2d) 619, 622 (C. C. A. 9th)

II

The court erred in excluding expert testimony offered by defendant regarding the significance properly attributable to diagnoses of plaintiff's condition. The prejudicial effect of excluding this testimony was aggravated by the fact that testimony of the same character had been adduced by plaintiff

Throughout the trial, the primary object of attack by plaintiff was the medical record of his physical condition during the years prior to 1940, and particularly during the years from 1924 to 1936. During this latter period, medical examinations of the plaintiff had consistently resulted in diagnoses of moderate psychoneurosis and non-disabling laryngitis only. There was testimony, undisputed, that a moderate degree of psychoneurosis is usually not disabling to any substantial degree.

Plaintiff sought to avoid the effect of these diagnoses (1) by expert testimony that although psychoneurosis, moderate, is generally neither totally disabling nor incurable, the diagnoses in the present case indicated a more serious condition that was incurable, and (2) by showing that, for lack of scien-

tific knowledge with respect to psychoneurosis and related conditions, these diagnoses may have been erroneous.

With respect to the first of these, plaintiff interrogated his own neuropsychiatric expert at length regarding each diagnosis in particular, and finally regarding the combined effect of all of them, eliciting his opinion as to the nature and degree of disability reflected by the diagnoses, and a final opinion that, in this particular case, they reflected a condition that was incurable. (Supp. 116-118.) Cross-examination of this witness with respect to the conclusions he had drawn from the diagnoses brought forth the following:

Q. Doctor, if a man has a diagnosis of neurocirculatory asthenia, severe, on August 30, 1932, and on October 29, 1936, he is given a diagnosis of psychoneurosis, neurasthenia, moderate, would you say that his condition had improved?—A. From what date?

Q. The first date I gave you, Doctor, the first diagnosis, was August 30, 1932.—A. Diagnosis?

Q. Of Neurocirculatory asthenia, severe; and on——

A. He hadn't improved, I'll answer it. (Supp. 125.)

With respect to the other theory plaintiff sought to advance—that the diagnoses of psychoneurosis, moderate, were erroneous—plaintiff's neuropsychiatric expert had testified that many people regarded psychoneurosis as a forerunner of insanity and, for that reason, characterized it as a mild psychosis. (Supp. 128.)

Cross-examination of defendant's expert witness, Dr. Foxwell, resulted in testimony that, in his opinion, psychoneurosis, neurasthenia, and hysteria, were descriptive of conditions definitely susceptible to diagnosis and, in particular, that they were wholly unrelated to psychosis. Further cross-examination of this witness disclosed that he had never examined the plaintiff and that his opinion upon direct examination, to the effect that a moderate degree of psychoneurosis was only mildly disabling and that it was curable, had no reference to plaintiff's case in particular, but to psychoneurosis in general. (Supp. 180.)

Thereupon defendant sought, through redirect examination, to connect the testimony of Dr. Foxwell to the particular case by inviting his attention to the diagnoses of plaintiff's condition made during the years from 1924 to 1936, and by eliciting his opinion thereon in the same manner that plaintiff had brought forth the opinion of his medical expert. The court intervened on a number of grounds, indefinitely stated at first, but finally resolved into the single ground that the diagnoses of mental and nervous conditions were necessarily so indefinite and inaccurate that no reliable opinion could be formulated with respect to them.

The position to which defense counsel was ultimately forced in this respect was that the opinions of his expert witness were valueless unless based upon the particular case, and that the means of connecting them with the particular case extensively employed by plaintiff, were denied to the defendant. In the presence of the jury, the court also laid down the proposition in effect—contrary to expert testimony previously given—that it is a matter of common knowledge that scientific information regarding mental and nervous diseases is so meager that diagnoses of them were necessarily inaccurate and unreliable. The entire proceedings with respect to the matters outlined in the preceding paragraphs were as follows:

Redirect examination by Mr. SPELL:

Q. Doctor, I ask you to assume an individual who had a diagnosis of "hysteria" in 1926, diagnosis of "psychoneurosis, hysteria, moderate" in 1928, diagnosis of "neurasthenia, moderate degree, neurocirculatory in type" in 1929, and a diagnosis of "psychoneurosis, mixed type, moderate" in 1936, and also in 1936 had a diagnosis of "psychoneurosis, neurasthenia, moderate," and ask you to think of a man who had had those diagnoses over a period of time.

I wish you also would assume that this man has run a trucking business during all the years in the diagnoses covered; that he was a mail carrier in 1928 to 1936, driving his automobile; that he did extra work around the post office from 1927 to 1935, carrying bundles and

delivering packages; that during that time he drove part of the way or most of the way from Arlington, Virginia, to Miami, Florida; that he averages driving an automobile five or six thousand miles a year; that he has engaged as a painting and paperhanging contractor supervising men on labor from 1928 to and including the last date of the diagnosis I just stated.

I ask you to assume that individual and state if you have an opinion——

Mr. DAWSON. An opinion on what?

By Mr. SPELL:

Q. (Continuing.) Of whether his psychoneurosis was aggravated by this work record that I have stated to you.

The COURT. Objection sustained. No human being could answer that question.

By Mr. SPELL:

Q. Doctor, do you have an opinion of whether or not the condition in 1936 was worse than it was in 1928?

Mr. DAWSON. I just object to that. There is no question there.

The COURT. How could he know anything about that?

Mr. DAWSON. No.

The COURT. And, of course, in order to clarify the situation some, there are other fundamental objections. You stated he was running a trucking business. There is nothing in the statement to indicate the size of the trucking business, how it was conducted, who conducted it. Your question is just such that it is impossible for the witness to answer it.

Mr. SPELL. Your Honor, I will agree to amendment if counsel has any to offer to my——

The COURT. Well, no; no. Counsel do not have to formulate the question for you. I don't believe you can formulate a question that would be admissible in evidence, but you may try it if you wish.

By Mr. SPELL:

Q. From the diagnoses I have stated to you, which began in 19——

The COURT (interposing). There is evidence in this case of hardening of the arteries. There is evidence by the eye examination of hardening of the arteries of the brain in this case. You see, you have not covered that ground.

Mr. SPELL. Well, if your Honor pleases, if counsel wishes to ask the question after I have finished——

The COURT. Well, I know, but the Court has some function.

Mr. SPELL. He may ask him to assume those additional facts.

The COURT. The Court has some function here, and the Court, in a matter as important as this, on a question as vital as this, cannot sit here idly and let a question that is clearly wrong be answered, whether counsel objects or not.

Mr. DAWSON. And, your Honor, I never objected because——

The COURT. I am not criticizing you at all.

Mr. DAWSON. Yes.

The COURT. I didn't mean it in that sense, but I mean the Court has a perfect right to object, itself, if it sees fit to do it.

Mr. SPELL. Yes; your Honor.

By Mr. SPELL:

Q. Doctor, I will ask you to assume an individual who has a diagnosis of "psychoneurosis, hysteria, moderate" in 1928 and has a diagnosis in 1936 of "psychoneurosis, neurasthenia, moderate." I ask you if in your opinion this man's disability had increased over those years?

Mr. DAWSON. I object to that question on the ground he is asking him to base his opinion on the opinion of somebody else.

The COURT. I sustain the objection. You see, "psychoneurosis, moderate"—it is a matter of common knowledge that these diseases of the brain are the most obscure things in life; and not only the most obscure, but medicine hasn't scratched the surface of them yet.

Now, then, one doctor might say it was a psychoneurosis moderate; another physician might classify it another way. There is no evidence that the same physician made both of those examinations; and there is no evidence that, if he had, he would have the same thing in mind: one physician. As obscure as these diseases are known to be, are generally known to be among informed people of all classes, whether they be physicians or otherwise, as obscure as they are, the same physician might diagnose a condition in one way today and, if he forgot about the patient, in another way next week.

Now, then, to undertake to ask this physician to formulate an opinion upon what some doctors did in 1928 and 1936, the Court cannot permit it.

Mr. SPELL. Your Honor, what I had in mind was that I haven't referred to Mr. Cox. I asked the psychiatrist, as an expert, to assume a man with those diagnoses. I didn't pin it to Mr. Cox.

The COURT. Well, you have got to pin it to Mr. Cox; he is the man who is bringing this suit. You may not wander all over the country on this thing.

Mr. SPELL. This doctor is testifying as an expert, and I am asking him about his two diagnoses as an expert. I haven't put in any other evidence, who examined him, what physician. I just asked him to assume that those diagnoses are correct.

The COURT. The Court is compelled to sustain the objection.

Mr. SPELL. That will be all, Doctor. (Supp. 181-184.)

We submit that the testimony sought by counsel in asking the question set forth above was proper and admissible

even if considered by itself, without reference to what had gone before. But, in any event, objection to it on behalf of the plaintiff was foreclosed because testimony of the same character had been adduced by the plaintiff and was relied upon by him as an essential part of his case. *H. Herfurth, Jr. Inc. v. United States*, 85 F. (2d) 719, 723 (App. D.C.), and cases therein cited. In *Warren Live Stock Co. v. Farr*, 142 Fed. 116 (C. C. A. 8th), one of the cases cited by this court in the above mentioned case, it was pointed out at page 117 that:

But, even if the matter of the intermingling of the sheep was wholly irrelevant to the issue, the plaintiff is in no position to object to the defendant's evidence concerning it. It was the plaintiff who first introduced into the case evidence upon that subject. It is a familiar rule that one who induces a trial court to let down the bars to a field of inquiry that is not competent or relevant to the issues cannot complain if his adversary is also allowed to avail himself of the opening.

The view of the court underlying this erroneous exclusion of evidence is illustrated by proceedings had with respect to the erroneous exclusion of other evidence offered by defendant. (Apparently no substantial prejudice resulted from this error and it is not, therefore, asserted as a separate ground for reversal.) The plaintiff testified that he was receiving compensation in the amount of \$50.00 per month (Supp. 39) for "lung trouble" (Supp. 40). Thereafter, defendant offered evidence to show an exact computation of the amount of compensation which the plaintiff had received and claimed the right to introduce such evidence upon the ground stated by counsel and replied to by the court as follows:

Mr. SPELL. It has been opened up by the plaintiff.

The COURT. I don't care by whom it has been opened up; when there is objection it is not admissible testimony. It stops right there. (Supp. 195.)

Prejudice resulting from the exclusion of the testimony of Dr. Foxwell, discussed above, was aggravated by the court's

explanation that mental and nervous diseases were too obscure for reliable diagnoses. The jury was thereby led to believe that neither the testimony of Dr. Foxwell nor the diagnoses of psychoneurosis could be credited.

III

The court erred in denying defendant's requested instructions Nos. IX and XIV

Defendant's instructions Nos. IX and XIV were designed to invoke consideration by the jury of evidence tending to show performance by plaintiff and his ability to perform work of a managerial or supervisory nature. Recognizing that the instructions were correct statements of the law, the court rejected instruction No. IX expressly, and XIV, apparently, upon the ground that there was no evidence in the case to which they could be regarded as applicable. The requested instructions and the reason for rejecting them, as stated by the court, were:

Requested instructions:

IX

If you find that the plaintiff has been unable because of his condition to engage continuously in any substantially gainful occupation requiring physical labor or exertion, but believe that he could follow a substantially gainful supervisory or managerial occupation with reasonable regularity, then your verdict must be for the defendant.

XIV

You should give the same weight to evidence of work of a supervisory or managerial nature as is given to evidence of work requiring physical exertion. (Supp. 204.)

Reasons for rejection:

The COURT. I cannot grant the ninth prayer. The ninth prayer indicates that there is serious evidence in the case that he could do clerical work, for instance.

He has not education enough to do it, under the evidence.

Mr. SPELL. Your Honor should add, if I may say so, he had four years and three months studying to be an office assistant, in Strayer's Business College.

The COURT. But he did not have education enough to do it. He could not pursue it, didn't know what it was all about.

Mr. SPELL. For a long time he did, your Honor. He was bound to learn something, or they would have kicked him out of it long ago. He has been in it three years.

The COURT. I was in Congress for nearly 20 years, I have had a great many of these cases, and I know something about vocational training and what it amounts to and what it amounted to during the time, and I know a great deal about how the Veterans' Bureau was run.

Mr. SPELL. Your Honor, I should like to show you that statement he wrote to Mr. McClaine, and let's see whether you think he is an intelligent man or not.

The COURT. How is that?

Mr. SNELL. That letter he wrote to Mr. McClaine about deducting the compensation.

The COURT. I haven't said he was not intelligent. (Supp. 199-200.)

Thus it was the view of the court that the single fact that the plaintiff's formal education was limited was conclusive as a matter of law that he could not perform work of a clerical, managerial, or supervisory character or, indeed it appears, any work other than manual labor.

Of course, lack of formal education does not show lack of capacity to acquire knowledge and training, nor that they have not been acquired informally. This was overlooked by the court, it appears, and, furthermore, denial of the requested instructions upon the ground stated reflects the additional erroneous view that ability to perform managerial or super-

visory work could not properly be inferred from the evidence that prior to service the plaintiff operated a substantial business in the sale and distribution of bread; that immediately after service he was reemployed by the DuPont Company as yard foreman; that he had managed a trucking business so well that, without performance of any manual labor himself, he had derived a monthly income in excess of \$15.00; that he had performed the business and supervisory duties of a substantial papering and painting contracting business; that he was a competent mail carrier; that he was frequently called by Mr. Pfeiffer to take charge of his grocery store; and that the plaintiff himself, as well as Government officials charged with the duty of making a determination with respect thereto, and officials of Strayer's Business College, regarded him as capable of learning stenography and bookkeeping. In the absence of any evidence to the contrary, it is to be presumed, we submit, that the plaintiff would not have been given vocational training of that character unless it reasonably appeared that he would succeed in it. At the trial the plaintiff made no claim that the study of stenography and bookkeeping was affected adversely by either intellectual or educational limitations. He testified only that his vocational training was not completed because of physical illness.

If the jury entertained the view adopted by the court much of defendant's substantial and pertinent evidence was passed without consideration upon the belief that, as a matter of law, it had no probative value. That the jury entertained such view can hardly be doubted, we believe, in view of the plain implications flowing from the following questions:

By the COURT:

Q. Did you complete the fifth grade?—A. Well, I couldn't say that I did.

Q. Well, do you know you didn't go any further than the fifth grade?—A. Well, it was the schools then, we had no grades when I went to school.

Q. Well, they didn't when I went, either, but you estimate the fifth grade, do you?—A. Well, that's what

the report shows when I took the examination in the army.

Q. Yes. And with that sort of education they attempted to give you vocational training in bookkeeping and stenography?—A. Yes, sir.

The COURT. Proceed. (Supp. 26.)

But regardless of the view actually adopted by the jury, the probability of failure to appreciate the legal significance of evidence that plaintiff had performed managerial and supervisory work was inherent in the case, and defendant was entitled to instruction specifically setting forth the law applicable to such evidence.

IV

Indications of partiality and bias on the part of the district court, favorable to plaintiff and adverse to defendant, deprived defendant of a fair trial

The judgment should be reversed because of plain violation of the well-established principle illustrated by the proposition that "The influence of the trial judge upon the jury 'is necessarily and properly of great weight' and 'his lightest word or intimation is received with deference, and may prove controlling.'" (*Quercia v. United States*, 289 U. S. 466, 470), and the further proposition that:

"In these insurance cases brought by soldiers, every sympathy of the jury is with the plaintiff, and it is particularly imperative that the trial judge observe a scrupulous detachment." (*Mason v. United States*, 63 F. (2d) 791, 793 (C. C. A. 2nd). See also *United States v. Messenger*, 68 F. (2d) 234, 236-237 (C. C. A. 4th).

The comments and attitude of the trial judge in the present case clearly had the effect of indicating a partiality on the part of the court, favorable to the plaintiff and against the defendant. There was emphasis by the court of evidence favorable to the plaintiff and de-emphasis of evidence favorable to the defendant, there were instances of repudiation by the

court of evidence essential to the theory of the defense, and unwarranted reprimand of defense counsel.

Between 1924 and 1940, medical examination of the plaintiff resulted in diagnoses only of moderate psychoneurosis and non-disabling laryngitis, and since moderate psychoneurosis is neither incurable nor incompatible with the pursuit of gainful employment, plaintiff sought to sustain the theory that these diagnoses were incorrect and that, in any event, psychoneurosis was totally disabling in this particular case.

With respect to the correctness of the diagnoses, Dr. Guynn, plaintiff's neuropsychiatric expert, had testified that many people think that psychoneurosis is a forerunner of insanity and, therefore, characterize it as a mild psychosis. (Supp. 128.) Dr. Foxwell testified that psychoneurosis, neurasthenia, and hysteria described well-recognized conditions and were definitely distinguishable from psychosis. (Supp. 177-178.) The court questioned this testimony at the time it was given and later, in direct opposition to it, made the following statement in the presence of the jury:

You see, "psychoneurosis, moderate"—it is a matter of common knowledge that these diseases of the brain are the most obscure things in life; and not only the most obscure, but medicine hasn't scratched the surface of them yet.

Now, then, one doctor might say it was a psychoneurosis moderate; another physician might classify it another way. There is no evidence that the same physician made both of those examinations; and there is no evidence that, if he had, he would have the same thing in mind: one physician. As obscure as those diseases are known to be, are generally known to be among informed people of all classes, whether they be physicians or otherwise, as obscure as they are, the same physician might diagnose a condition in one way today and, if he forgot about the patient, in another way next week. (Supp. 183-184.)

With respect to the disabling character of psychoneurosis, the court interrupted the direct examination of defendant's

neuropsychiatric expert to add a statement evidentiary in character and beneficial to the plaintiff as follows:

Q. Doctor, assume a man that has a diagnosis of psychoneurosis, moderate. What effect will moderate physical or mental exertion have on that man's health?—A. A patient with a moderate degree of psychoneurosis is encouraged to work to divert his attention, and it should have a beneficial effect upon his health.

By the COURT:

Q. The difficulty is to get him to do it, isn't it?—A. Sometimes; yes.

The COURT. Of course, that is the difficulty. (Supp. 176.)

As previously pointed out, the District Court entertained the view, emphatically expressed out of the presence of the jury, that by reason of the plaintiff's lack of education no inference was permissible that he could perform, or learn to perform, clerical, supervisory, or managerial work. The court's belief in this respect was plainly conveyed to the jury. While plaintiff was testifying upon direct examination, in effect, that his failure to complete vocational training was due solely to illness, the court interrupted and suggested an entirely different reason, as follows:

By the COURT:

Q. Did you complete the fifth grade?—A. Well, I couldn't say that I did.

Q. Well, do you know you didn't go any further than the fifth grade?—A. Well, it was the schools then, we had no grades when I went to school.

Q. Well, they didn't when I went, either, but you estimate the fifth grade, do you?—A. Well, that's what the report shows when I took the examination in the army.

Q. Yes. And with that sort of education they attempted to give you vocational training in bookkeeping and stenography?—A. Yes, sir.

The COURT. Proceed. (Supp. 26.)

The medical evidence revealed diagnoses of a heart condition in 1918 and 1919, and again in 1940, but an absence of any heart condition from 1924 to 1936. Plaintiff sought to sustain the view that a heart condition substantially disabling in character in fact existed throughout the years, despite the medical diagnoses to the contrary. The expressed view of the court in this respect was that "There is plenty of evidence in the record of mitral regurgitation prior to 1927". (Supp. 124.) In substance, and in language almost identical, this was repeated by the court in the presence of the jury at least six times. (Supp. 120, 121, 124, 125, 126, 201.) The last was during the course of plaintiff's argument to the jury, at which time the court abandoned reference to the evidence, stating that the plaintiff "had a mitral regurgitation before he went in the Army", and characterizing as "true" the statement of plaintiff's counsel that since "Anybody who is a doctor at all, who owns a stethoscope, can find a mitral regurgitation", it follows that "Dr. Connor * * * simply didn't make an examination of this man". (Supp. 201.) Dr. Connor, cardiac specialist, had signed a medical examination report reciting that, upon his special heart examination of the plaintiff on March 13, 1928, no cardiac disease was found. (Supp. 190.)

At still another point, the court interposed to require a medical witness to emphasize, by repeating in detail, certain medical findings favorable to the plaintiff with respect to his heart condition. (Supp. 104.)

For the purpose of ascertaining whether he had an interest in the outcome of the case, defense counsel asked Dr. Guynn whether his remuneration for examining the plaintiff and appearing as a witness for him was in any way contingent upon the outcome of the case. Thereupon, the following occurred:

The COURT. The Court is not going to permit questions like that in this courtroom. This Court will not permit that sort of examination.

Mr. DAWSON. I will say right now that he will not.

The COURT. Why, everybody knows that the doctor

is employed to testify as an expert, and he is going to be paid for it, I suppose. He should be.

The WITNESS. Already paid for it.

Mr. DAWSON. Your Honor, in view of the fact that counsel has brought this issue up——

The COURT. There is no occasion—unless there is something about the doctor's testimony, the witness' testimony, which justifies it, it is never permissible to reflect, obviously reflect, upon the character of the witness; and there has been nothing up to this time in the witness' testimony which justifies anything of the kind.

Mr. SPELL. I should like to show, your Honor, whether he is consciously or unconsciously interested in this matter.

The COURT. The Court will not permit that sort of examination, sir. Absolutely will not permit it in this courtroom.

Mr. SPELL. Yes.

The COURT. It is contempt of court.

Mr. DAWSON. I will make a statement if Mr. Spell——

The COURT. It is not necessary.

Mr. DAWSON. Very well.

The COURT. You have just as much right to put a lawyer in every case on the stand and ask him how much fee he is going to get or whether his fee is contingent or actual and how much the contingency is; there is no difference in the world. If you start that kind of thing, why, you couldn't run a court. In other words, he would have just as much right to put you on the stand and ask you what your salary was. (Supp. 131-132.)

We submit that the question was proper but, in any event, the mere asking of it was no ground for reprimand and a characterization of the attorney's conduct as contempt. This court has said:

The fact that a witness is interested in the result of a suit is one that may always be brought out on cross-examination.

Crook v. International Trust Co., 32 App. D. C. 490, 512.

See also:

Economon v. Barry-Pate Company, 3 F. (2d) 84, 85 (App. D. C.)

In *Sprinkle v. Davis*, 111 F. (2d) 925 (C. C. A. 4th), the trial court had reprimanded counsel for offering in evidence, for the purpose of impeachment, a document which had been excluded when offered as material to the issue in litigation. Assuming the evidence to be inadmissible even for the purpose of impeachment, the Circuit Court of Appeals stated (p. 930):

Counsel were nevertheless entitled to offer it in good faith free from threat of punishment by the court. Actions taken by counsel during the course of trial under a mistaken view of the law do not constitute contempt.

The trial court's unjustified reprimand of counsel was there held to be highly prejudicial, requiring reversal of the judgment.

The extent to which the court's attitude influenced the jury cannot, of course, be ascertained and proved, and it is immaterial. Without inquiry in this respect, a verdict will be set aside if an extraneous influence, likely to affect the jury, was present. In *Southern Pacific Co. v. Klinge*, 65 F. (2d) 85, 88 (C. C. A. 10th), the test was stated to be whether the extraneous influences "were of a nature as to make it probable that they entered into the consideration of any juror when his vote was cast." See also:

Mattox v. United States, 146 U. S. 140, 149

McKibben v. Philadelphia & R. Co., 251 Fed. 577, 578 (C. C. A. 3rd)

CONCLUSION

It is respectfully submitted that, for lack of substantial evidence to support the verdict for plaintiff, the judgment should be reversed with directions to enter judgment for defendant, but that, in any event, the judgment should be reversed and a new trial granted to defendant for errors herein set forth.

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MAY 1941.

BRIEF FOR HARRY C. COX, APPELLEE

IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA

DEPT. OF APPEALS FOR THE
DISTRICT OF COLUMBIA

—
No. 7876

FILED SEP 19 1941

—
Joseph W. Starnes

UNITED STATES OF AMERICA, *Appellant* CLERK

VS.

HARRY C. COX, *Appellee*

**Appeal from the District Court of the United States
for the District of Columbia**

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INDEX.

	PAGE
Counter-Statement of the Case	1
Statutes, Regulations and Rules of Court Involved....	2
Summary of Argument	4
Argument and Brief	6
Point One	7
Point Two	27
Point Three	28
Point Four	31
Conclusion	42

TABLE OF CASES.

Alexander v. Blackman, 26 App. D. C., 541.....	10, 16
Berry v. United States, (61 Sup. Ct. Adv. 637)....	20, 21, 22
Bissonette v. National Biscuit Co., 100 Fed. (2d) 1003	
(C. C. A. 2)	32
Bethlehem Steel Co. v. National Labor Relations Board,	
120 Fed. (2d) Adv. 641	32
Carter v. United States, (C. C. A. 4) 49 Fed. (2d) 221,	
223	24
Cohen v. Evening Star Newspaper Co., 72 App. D. C.	
258, 115 Fed. (2d) 525	30, 31
Conway v. O'Brien, 61 Sup. Ct. Rep. Adv. 634	22
Deadrich v. United States, 74 Fed. (2d) 619, 622 (C. C.	
A. 9)	25, 26
Drumm-Flato Comm. Co. v. Edmisson, 208 U. S. 534,	
52 L. ed 606	32
Eggen v. United States, 58 Fed. (2d) 616, 620 (C. C.	
A. 8)	25, 26
Galt v. Phoenix Indemnity Co., 120 Fed. (2d) Adv. 723..	20
Glaria v. Washington Southern R. Co., 30 App. D. C.,	
563	7

II.

	PAGE
Goldstein v. United States, 63 Fed. (2d) 609 (C. C. A. 8)	32
Gunning v. Cooley, <i>supra</i> , 281 U. S. 90, 74 L. ed. 720..7, 10	
Jennings v. Philadelphia B. & W. R. Co., 29 App. D. C. 219-235	7
Lumbra v. United States, 290 U. S. 551, 559, 78 L. ed. 492	20, 24
Madray v. United States, 55 Fed. (2d) 552	22
Manhattan Oil Co. v. Mosby, 72 Fed. (2d) 840 (C. C. A. 8) 32	
Meador v. National Liberty Insurance Co., 53 Fed. (2d) 731 (C. C. A. 5)	27
Newman v. United States, 28 Fed. (2d) 681 (C. C. A. 9) 38	
Nicolay v. United States, 51 Fed. (2d) 170, 173 (C. C. A. 10)	24
Pilger v. Sutherland, 57 Fed. (2d) 604, 61 App. D. C. 84 27	
Rappaport v. Capital Traction, Co., 48 App. D. C. 359	10, 16
Ricketts v. United States, 32 Fed. (2d) 943, 59 App. D. C. 47	27
Ruete v. Elwell, 15 App. D. C. 21	10, 16
Sprinkle v. Davis, 111 Fed. (2d) 925	37
United States v. Barry, 67 Fed. (2d) 763, 765 (C. C. A. 6th)	25
United States v. Brown, 72 Fed. (2d) 608 (C. C. A. 10)	23, 24
United States v. Burleyson, (C. C. A. 9) 64 F. (2d) 868, 872	24
United States v. Lawson, (C. C. A. 9) 50 Fed. (2d) 868, 872	24
United States v. Martin, 67 Fed. (2d) 356 (C. C. A. 7) 23	
United States v. Phillips, (C. C. A. 8) 44 Fed. (2d) 689, 691	24
United States v. Sauls, 65 Fed. (2d) 886, (C. C. A. 4)..	23

III.

	PAGE
United States v. Sorrow, (C. C. A. 5) 67 Fed. (2d) 372	24
United States v. Spaulding, (C. C. A. 5) 68 Fed. (2d) 656	24
United States v. Stewart, 58 Fed. (2d) 520	7, 8
United States v. Tyrakowski, 50 Fed. (2d) 766 (C. C. A.	
7)	23
United States v. Witbeck, 113 Fed. (2d) 185	8
Woltman v. United States, 57 Fed. (2d) 418	8, 22

STATUTES, REGULATIONS AND RULES OF COURT INVOLVED.

Act of March 3, 1911 (28 U. S. C. A. 391, Judicial Code	
Sec. 269) as amended; R. S. 726, March 3, 1911 C.	
231, 36 Stat. 1163, c. 48, 40 Stat. 1181)	3, 32, 33
Act of Oct. 6, 1917, c. 105, 40 Stat. 398, 409 Sec. 400....	2
World War Veterans' Act 1924 as amended July 3, 1930	
(U. S. C. Title 38 Par. 445) Sec. 19.....	2
Act of March 4, 1925 c. 553, 43 Stat. 1308 (U. S. C. Title	
38 Sec. 511) Sec. 12	2
Act of June 7, 1924, c. 320, 43 Stat. 624 Sec. 300.....	2
Rule 51 of the Federal Rules of Civil Procedure....	4, 5, 28
Rule 61 of the Federal Rules of Civil Procedure.....	4, 33
Treasury Decision 20, Bureau of War Risk Insurance,	
March 9, 1918	3

IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA

No. 7876.

UNITED STATES OF AMERICA, *Appellant*

vs.

HARRY C. COX, *Appellee*

**Appeal from the District Court of the United States
for the District of Columbia.**

BRIEF OF THE APPELLEE.

Counter-Statement of the Case.

The appellee, Harry C. Cox, hereinafter called the plaintiff recovered a judgment on his war risk insurance contract based upon a jury verdict to the effect that he became permanently and totally disabled while his insurance contract was in force on May 1, 1927.

This appeal is from the judgment entered on December 19, 1940 (App. Supp. 205). Since the appellant has filed a complete record of the testimony adduced at the trial, and has printed in its supplement all of the evidence with the

exception of the testimony of two witnesses for the appellant, the plaintiff does not include in his brief any additional evidence.

Appellant raises four points on appeal. *First*, the alleged insufficiency of the evidence to support the verdict; *Second*, the exclusion of certain testimony; *Third*, alleged error in refusing certain requested instructions, and *fourth*, partiality and bias of the trial court. The questions will be discussed in the order in which they are raised in the appellant's brief.

Statutes, Regulations and Rules of Court Involved.

Section 400 of the Act of October 6, 1917, c. 105, 40 Stat. 398, 409, provides as follows:

"That in order to give to every commissioned officer and enlisted man and to every member of the Army Nurse Corps (female) and of the Navy Nurse Corps (female) when employed in active service under the War Department or Navy Department greater protection for themselves and their dependents than is provided in Article III, the United States, upon application to the Bureau and without medical examination, shall grant insurance against the death or total permanent disability of any such person in any multiple of \$500, and not less than \$1,000 or more than \$10,000, upon the payment of the premiums as hereinafter provided."

This section was restated in substance in Section 300 of the Act of June 7, 1924, c. 320, 43 Stat. 624, as amended by Section 12 of the Act of March 4, 1925, c. 553, 43 Stat. 1308 (U. S. C., Title 38, Sec. 511).

Section 19 of the World War Veterans' Act, 1924, as amended July 3, 1930, (U. S. C., Title 38, Paragraph 445) provided:

"Sec. 19. In the event of disagreement as to claim, including claim for refund of premiums, under a contract of insurance between the bureau and any person or persons claiming thereunder an action on the claim may be brought against the United States either in the Supreme Court of the District of Columbia or in the District Court of the United States in and for the district in which such persons or any one of them resides, and jurisdiction is hereby conferred upon such courts to hear and determine all such controversies.
* * *

The Act of March 3, 1911 (28 U. S. C. A. 391, Judicial Code, Section 269 as amended) provides:

"NEW TRIAL; HARMLESS ERROR. All United States Courts shall have the power to grant new trials, in cases where there has been a trial by jury for reasons for which new trials have usually been granted in courts of law. *On the hearing of any appeal, certiorari, writ of error, or motion for a new trial in any case, civil or criminal the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties*" (R. S. 726, March 3, 1911 C. 231, 36 Stat. 1163 C. 48, 40 Stat. 1181). (Italics supplied.)

Treasury Decision 20, Bureau of War Risk Insurance, of March 9, 1918, defined total permanent disability as follows:

"Any impairment of mind or body which renders it impossible for the disabled person to follow continuously any substantially gainful occupation shall be deemed * * * to be total disability.

'Total disability' shall be deemed to be 'permanent' whenever it is founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering from it."

The Federal Rules of Civil Procedure provide:

* * * * *

“RULE 51. INSTRUCTIONS TO JURY: OBJECTION. At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed actions upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. *No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection.* Opportunity shall be given to make the objection out of the hearing of the jury.” (Italics supplied.)

“RULE 61. HARMLESS ERROR. No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. *The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.*” (Italics supplied.)

Summary of Argument.

I.

There was substantial evidence to support the finding of the jury that the appellee became permanently and totally disabled on May 1, 1927. The evidence shows that the appellee as early as June, 1918 was suffering from a

severe heart disability for which he was discharged as unfit for military service in 1918. In 1922 he was examined and found to have moderately advanced tuberculosis of both lungs (App. Supp. 13). The evidence clearly shows that on May 1, 1927, the appellee was suffering from his heart disability, tuberculosis, and a severe nervous condition. He has not engaged in any occupation of a substantial or gainful character since May 1, 1927, and indeed not since the year 1918. The issue was clearly one of fact for the jury to determine under the decisions of this court, and the United States Supreme Court.

II.

The appellant complains of the court's ruling in excluding certain alleged testimony of Dr. Foxwell. This point may be disposed of summarily because the record does not show any offer of proof of the evidence which appellant intended to offer. Therefore, there is nothing before this court for determination on this point.

III.

The appellant complains of the court's refusal to grant certain instructions relating to the ability of the plaintiff to perform work of a supervisory capacity or managerial nature.

This point may also be disposed of summarily, because the record does not disclose that Rule 51 of the Federal Rules of Civil Procedure was complied with appellant did not object to the granting of or refusal to grant instructions and state distinctly the grounds of his objection as required by that rule.

However, the jury was properly instructed. Appellant does not have any vested right in any particular instruction. Where the jury is properly instructed as it was here, there is no error in failing to grant a particular instruction, even though it may be proper (which appellee does not concede).

Further, counsel for appellant argued at length to the jury that the plaintiff could perform work of a supervisory or managerial capacity so that question was fully considered by the jury and even if the court should be of the opinion that this was error (which appellee does not concede), it was harmless error.

IV.

The court did not show any partiality to the appellee during the trial. In fact, the Court was very courteous to counsel for the appellant who tried the case for the government as will be pointed out in the argument. There is no evidence that the jury was influenced by the court. This assertion of the appellant is wholly without merit.

ARGUMENT AND BRIEF.

The court's attention is invited to the significant fact that the United States Attorney for the District of Columbia, who is primarily charged with the defense of this action did not sign appellant's brief. This unusual occurrence must indicate that he either does not approve of the contents of appellant's brief or is not in sympathy with this appeal.

The appellant's Points on Appeal are wholly without merit.

Point One.

There was ample evidence submitted to the jury that the plaintiff was permanently and totally disabled as of May 1, 1927.

In the case of *Glaria v. Washington Southern R. Co.*, 30 App. D. C. 563, this court said:

"A motion to direct a verdict is an admission of every fact in evidence, and of every inference reasonably deducible therefrom. And, the motion can be granted only when but one reasonable view can be taken of the evidence and the conclusions therefrom, and that view is utterly opposed to the plaintiff's right to recover in the case."

In the case of *Jennings v. Philadelphia, B. & W. R. Co.*, 29 App. D. C. 219-235, this court said:

"In other words it is only where all reasonable men can draw but one inference from the facts that the question is one of law for the Court."

As was said by this court in the case of *United States v. Stewart*, 58 Fed. (2d) 520, a war risk insurance case where the question involved was that here presented, the applicable rule in determining the question here presented is stated in *Gunning v. Cooley*, 281 U. S. 90, 74 L. ed. 720, which is if,

"on the trial of the issues of fact in an action at law before a Federal Court and a jury, the evidence, *with all the inferences that justifiably could be drawn from it*, does not constitute a sufficient basis for a verdict for the plaintiff or the defendant, as the case may be, so that such a verdict, if returned, would have to be set aside, the court may and should direct a verdict for the other party." (Italics supplied.)

It is significant that at no place in appellant's brief is reference made to any case decided by this court upon the question of the sufficiency of the evidence in a case of this character.

The facts presented in this record are much more favorable to appellee than were those present in the cases of *United States v. Stewart*, 58 Fed. (2d) 520, and *United States v. Woltman*, 57 Fed. (2d) 418 which were cases involving suits of this character in which this court sustained, on appeal, the jury's verdict in favor of the insured. Also, the facts here are stronger for appellee than were those existing in the case of *United States v. Witbeck*, 113 Fed. (2d) 185, a case involving converted insurance, where this court sustained the jury's verdict.

The contention that there was no evidence from which the jury could find that the plaintiff was permanently and totally disabled as of May 1, 1927 is practically frivolous.

The evidence shows that the plaintiff enlisted in the military service of the United States in 1917 (App. Supp. 22), and that on February 1, 1918, he applied for and was granted war risk term insurance in the amount of \$10,000.00 upon which he paid premiums until July 1, 1927 (App. Supp. 21). That on March 6, 1918 (App. Supp. 3, 6), he entered the base hospital at Camp Lee, Virginia, where he remained until June 1918 (App. Supp. 3). On August 23, 1918 he was discharged from the United States Army on a Surgeon's certificate of disability for (a) valvular heart disease, mitral regurgitation, (b) decrease in cardiac compensation subsequent to rheumatic fever (App. Supp. 4). The heart condition was aggravated by rheumatic fever while in the military service. He was under observa-

tion at the base hospital by a board of Army medical officers for two and one-half months before being discharged. Thus we have here a man who was found to be suffering with a serious heart disability as early as August, 1918. This condition could not be cured, and having once existed will ever remain. The testimony of the appellee's witnesses show this fact as will hereinafter be pointed out.

The appellant admits in its brief that the plaintiff might be permanently and totally disabled from June, 1940 (App. Brief p. 15). This admission is a strong one against interest because every disability which the plaintiff had in June, 1940, he also had on May 1, 1927, the date that the jury found that he was permanently and totally disabled. He was suffering on May 1, 1927 with a heart disability, tuberculosis, a mental disability, and chronic laryngitis. All of these conditions were found to exist by government physicians.

The appellant insists that the same physical and mental disabilities which constituted a permanent and total disability in June, 1940, did not constitute the same disability on May 1, 1927.

In addition to the testimony of the appellee and his lay witnesses, there were called two medical experts who testified as to the results of their examinations of the appellee.

It is interesting to note that diagnosis made January 15, 1926 by Doctor A. E. Marland, a mental psychoneurosis specialist (App. Supp. 117) was hypertension with a notation that it may be considered permanent. This checked with the diagnosis of Doctor Guynn who examined the appellee on behalf of appellant.

Appellant, while quoting parts of nine examinations of appellee (Appellant's brief pages 10-11), did not see fit to call as a witness even one of its many physicians who examined him. The inference from this significant fact is inescapable.

Clearly the "inference that justifiedly could be drawn" (as indicated in *Gunning v. Cooley, supra*) from this is that the failure to call a witness who can testify creates a presumption that his testimony would be unfavorable. *Alexander vs. Blackman*, 26 App. D. C. 541; *Ruete vs. Elwell*, 15 App. D. C. 21; *Rappaport vs. Capital Traction Co.*, 48 App. D. C. 359.

Attention is invited to the fact (App. Supp. 181) that Doctor A. E. Marland, who examined appellee, is in Washington; and the other several witnesses who examined appellee were in appellant's employ.

The appellee introduced the following reports of physical examinations made by government physicians which show the disabilities stated on the dates indicated.

August 23, 1918 Chronic endocarditis with mitral regurgitation, chronic laryngitis (App. Supp. 6).

April 9, 1919 Mitral regurgitation, with broken compensation. Possibly chronic pulmonary tuberculosis, but signs are indicative of cardiac asthma. Absence speaking of voice (App. Supp. 7).

April 16, 1919 Chronic pulmonary tuberculosis (App. Supp. 8).

November 29, 1919 Tubercular laryngitis (App. Supp. 11).

January 28, 1920 Laryngitis, chronic, arthritis, chronic, ankles, and elbows, bilateral, and left knee (App. Supp. 12).

February 8, 1922 Moderately advanced tuberculosis of both lungs (App. Supp. 13).

June 21, 1922 Laryngitis, chronic, hypertrophic, cause undertermined. X-ray of lungs shows (August 14, 1922) moderate infiltration of right upper lobe and both apices. Scattered thickened branches throughout both lungs (App. Supp. 14).

February 9, 1923 Tuberculosis of larynx. Bronchitis, chronic. Asthenia, neurocirculatory slight. Hysteria (App. Supp. 14-15).

April 4, 1924 Percussion both lungs: impaired at the apex and suprascapular region. Auscultation—both lungs—broncho-vesicular breathing. Mild increase of voice sounds. No rales. General diagnosis: Hyperopia, astigmatism, tachycardia, chronic tonsilitis, chronic laryngitis (App. Supp. 15).

October 28, 1924 Because of claimant's disability and marked emotional reaction it is noted that on former occasions such attempts have made the patient sick for the entire day. Hysteria, conversion type (App. Supp. 15-16).

May 16, 1925 Hysteria, mild (App. Supp. 16).

July 15, 1925 Treatment recommended for laryngitis (App. Supp. 16).

January 15, 1926 His marked emotional reaction to treatment was noted in my previous report. Hysteria (App. Supp. 16).

March 10, 1928 Tuberculosis, pulmonary, chronic, minimal, arrested. Diagnosis made on reports in file, positive sputum and physical findings. X-ray report (App. Supp. 16).

March 10, 1928 Mental report. Diagnosis: Psychoneurosis hysteria, moderate (App. Supp. 16).

March 12, 1928 Radiosteroscopic findings show some increase at the hilus and throughout the lungs (App. Supp. 17).

March 14, 1929 Mental examination. Psychoneurosis, moderate degree. Mild broncho-vesicular breath-

ing over apex. Diagnosis: Chronic pulmonary tuberculosis, minimal, apparently cured. Laryngitis, chronic; aphonia, partial (App. Supp. 17).

October 17, 1929 Considerable increase at each hilus with some calcification. Right vertebral branch markedly increased with some fibrotic changes noted in right upper lobe and apex. Lung parenchyma shows some slight increase throughout (App. Supp. 17).

December 2, 1930 Pulse standing 96, 124 after 15 hops, 110 in 3 minutes. Diagnosis: Neurocirculatory asthenia, moderate degree (App. Supp. 18).

August 25, 1932 Pulse at rest 90, after exercise 130. A slight cyanosis evident after exercise. There is a poor muscle tone on palpation. A fine tremor of closed eye lids, and a moderate hyperhidrosis. Diagnosis: Psychoneurosis (App. Supp. 18-19).

April 22, 1936 Pulse rate standing 86; sitting 86; immediately after exercise 120; 3 minutes after, 90. Diagnosis: Psychoneurosis, mixed type, moderate; laryngitis, chronic, mild; hypertension, moderate. History of pulmonary tuberculosis (App. Supp. 19).

October 29, 1936 Diagnosis: Psychoneurosis; neurasthenia, moderate; hypertension, moderate; laryngitis, chronic, hypertrophic, moderate; tonsillar tags, bilateral. Note: We are dealing with a psychoneurotic condition of considerably long standing (App. Supp. 19, 20).

Doctor Ray F. Guynn who was a nerve and mental specialist and employed by the United States Veterans' Administration examined veterans who were sent to him only for examinations when there was some question of their mental and nervous condition. He examined appellee on April 4, 1924 while employed by the United States Veterans' Administration from the standpoint of his nervous and mental condition found appellee (App. Supp. 103)

suffering from hypertension, a nervous condition, rapid pulse, tachycardia of the heart (App. Supp. 104) loss of voice (he could not speak at all) and appellee seemed exhausted after exercise. During the examination the exercise test which this physician made showed weakness on the part of the appellee.

This physician also examined appellee on March 14, 1929 (App. Supp. 105) when he found a condition of psychoneurosis, an emotional disturbance, which is a functional nervous disorder manifested by dizziness, instability of pulse, fainting, attacks of sleeplessness, weakness, inability to work. Appellee also had aphonia and was confused in his thinking. This was a real disabling disease, a mental disorder.

Doctor Guynn also examined appellee on October 15, 1929 (App. Supp. 107) at which time he was suffering from neuresthenia, a form of psychoneurosis and his symptoms centered around his circulatory system and heart, pulse and blood system. Exercise test showed appellee handicapped.

Two days before trial this physician made a general medical examination at which time he found a leak in appellee's heart known as mitral regurgitation. His heart was enlarged (App. Supp. 111) and his ankles were swollen. Doctor Guynn testified that swelling of the feet was one of the signs and symptoms of a cardiac disease (App. Supp. 111) and a condition of mitral regurgitation is incurable (App. Supp. 119).

He was emotionally unstable (App. Supp. 112) easily excited and worried and his memory appeared faulty.

Mitral stenosis (App. Supp. 114) is a permanent disability. This witness' examination showed almost the same as was shown at time of appellee's discharge from military service when he was discharged because of valvular heart disease, mitral regurgitation. The examination made August 23, 1918 (App. Supp. 114) by a surgeon of the Public Health Service was practically equivalent to the examination made by this physician. There is (App. Supp. 119) no cure for mitral regurgitation. A person (App. Supp. 119) suffering from this condition should lead a very careful life, take plenty of rest, avoid excitement and strenuous work. Persons in this condition usually feel like an invalid, they are conscious of their disability, and to work strenuously would be unwise and their health would be impaired further without care as to their activity. From the standpoint of mental condition he (App. Supp. 116) could concentrate mentally for a short period but he could not concentrate enough to hold a full time position.

Dr. Guynn also testified that the same findings and diagnosis made by the government doctors from 1925 on checked with his findings (App. Supp. 116-117-118).

This witness testified (App. Supp. 118):

"Q. Doctor, where from 1926 down to the present time as shown by the reports of Government's physicians, there has been a diagnosis made of psychoneurosis or hysteria, where that has existed over a period of some 14 years, what is your opinion as to whether or not the condition at its inception was a curable or an incurable condition? A. *It was incurable.* (Italics supplied.)

Q. From what date, Doctor? A. From the first time it was noted, even.

* * * * *

Q. Doctor, is a mitral regurgitation curable? In other words, can a valve ever be cured? A. I do not think it can, your Honor.”

On cross examination this witness testified that tachycardia may be an organic disability or may be functional (App. Supp. 122), it incapacitates a person very much and is usually indicative of a heart condition.

Doctor James Joseph Whisman testified (App. Supp. 139) when he examined appellee he had very high blood pressure (his blood pressure was between 210 and 220), his heart was enlarged, he suffered from a general conjunctive heart failure, his ankles were swollen, he had congestion in his chest and was suffering from a great deal of pain, besides minor complaints. He diagnosed appellee's condition (App. Supp. 140) as cardiac vascular renal disease, with hypertension and decompensation, and (App. Supp. 142) congestion. By decompensation (App. Supp. 140) is meant that the heart was failing to carry on the load necessary for him to continue any activity at all. He advised appellee (App. Supp. 141) to go home and go to bed and stay in bed. His condition was very serious at time of trial and he should be home in bed, this witness said.

His heart was enlarged (App. Supp. 143) and his blood pressure exceedingly abnormal, over 200 systolic (App. Supp. 144).

The appellant called only one medical expert in its behalf. Despite the fact that the plaintiff has been examined on numerous occasions by government physicians, counsel did not see fit to call one single medical expert who had examined the plaintiff. Instead, appellant called an expert who was a mental and nervous specialist. This fact is sig-

nificant and the inferences are unfavorable to the appellant. The failure to call a witness who can testify creates a presumption that his testimony would be unfavorable. *Alexander vs. Blackman*, 26 App. D. C. 541; *Ruete vs. Elwell*, 15 App. D. C. 21; *Rappaport v. Capital Traction Co.*, 48 App. D. C. 359. Appellant chose only to call a medical expert who had never examined the plaintiff.

Dr. Foxwell testified (App. Supp. 174) that he specialized in mental and nervous diseases. This expert witness of the appellant was asked only about the disability of psychoneurosis. He simply stated that some of his patients with this type of disability were working, and the disability was a functional one. But on cross examination he admitted that he had never examined the plaintiff (App. Supp. 177). That while psychoneurosis was considered curable, it depended upon other diseases. He gave his opinion on the disease of psychoneurosis and not on this particular man (App. Supp. 180). These classes of patients have a real disability (App. Supp. 180) and are not malingering (App. Supp. 181). He also testified that he knew Dr. Marland and Dr. Faber who were mental and nervous specialists and that both of these physicians lived in Washington, D. C. The importance of this fact is that both of these mental and nervous specialists when employed by the appellant, examined the appellee and yet the appellant did not see fit to call either of them as a witness. The fact that they were available and not called creates an unfavorable inference against appellant's case to the effect that their testimony would have been adverse to the appellant.

The plaintiff has reviewed the medical testimony because it reflects the true condition of the plaintiff, and gives to

this Court the proper background for the consideration of any so-called work record in this case.

The plaintiff testified (App. Supp. 22) that he had a heart disability while in the service. The Government doctors (App. Supp. 34) asked him not to do anything, right after his discharge in 1919. That he went into vocational training in 1919 and continued in such training until 1922 (App. Supp. 27). They took him out of such training, and he went back to his home in Virginia. He did not complete his vocational training. He tried to work (App. Supp. 28), and while climbing a ladder, his arms gave way and he fell. He went to Walter Reed Hospital where he stayed from December, 1922, then went home, staying (App. Supp. 29) at home, in a weak and nervous condition. If he tried to do anything he "gave out", had shortness of breath, and did nothing further until he was appointed a substitute mail carrier in 1927 (App. Supp. 30), where he worked about fifteen days to one month per year, at which he continued until 1936 (App. Supp. 31). During this period he did not go every time he was called (App. Supp. 30) because he was sick and could not travel; he was weak and nervous and afraid to drive his car.

When appellee (App. Supp. 31) attempted to work, he would have awful pains in his chest, be nervous and weak, could not travel, and would have to lie down. He (App. Supp. 32) tried to do paperhanging in the neighborhood. He stayed at home (App. Supp. 34), lying around in bed. He (App. Supp. 35) followed the advice of his physician and of government physicians and took care of himself, and (App. Supp. 36) as the result of the doctors' advice he laid around and rested at home. From 1918 to the date of trial his disabilities were the same. He makes himself

worse by working; he felt the same during all this period of time (App. Supp. 37), was weak and nervous, except in 1927 his voice returned so he could speak above a whisper. From 1918 to the date of trial he has suffered from pains in his chest, pains around his heart, and has been nervous.

While employed as a substitute mail carrier (App. Supp. 38) he could not do the work because of the condition of his health; he was nervous and weak and could not go out. When he would work, at the end of the day he was broken down (App. Supp. 40). In taking care of his health, from 1918 to the date of trial, he followed the doctors' orders and refrained from drinking and smoking.

His feet and legs have been swelling (App. Supp. 79, 80) since his discharge from the Army, down to the date of trial.

Appellee, notwithstanding his hospitalization in four hospitals of the United States Veterans' Administration, has not become any better.

The longest period of time when the plaintiff worked after 1927 was during the year 1929, when he made about \$26.00 a month on the average when he worked only 69 days as a substitute mail carrier. He made during the ten-year period approximately the sum of \$1309.00, an average of about \$11.00 a month and to earn this amount he had to maintain and pay the expenses of an automobile. This is the only work record worthy of mention.

The appellant contends that the fact that the plaintiff made an average over the ten-year period of \$11.00 a

month as a substitute mail carrier shows that he was following a substantially gainful occupation during this time. It is further asserted that because the plaintiff painted and papered some houses that he should not be permitted to recover a judgment. On page 6 of the appellant's brief, the number of houses which the plaintiff is alleged to have painted or papered is set forth. But it is significant that this plaintiff did not do this work himself.

The first houses mentioned in appellant's brief are those belonging to a Mr. Grisby. Mr. Grisby testified for the appellant that the plaintiff contracted for four houses. Three at \$200.00 a piece, and one for \$300.00 (App. Supp. 161). On cross examination he was asked if he had seen Mr. Cox do any of the work. He said, "No, no more than take a paint brush and maybe paint one side of a piece of trim or show the man or something like that" (App. Supp. 168). Cox complained on one occasion, and he remembered that a carpenter took him home.

In reference to the contract of McClaine for the apartment house, the contract, (Government's Exhibit No. 9) shows that it was also signed by another contractor, a M. G. Whitman (App. Supp. 171). Whitman was an experienced painter and a partner of the plaintiff. The paint bill for the apartment job was \$569.82. The total contract was \$1650.00, but this was cut to \$1400.00 (App. Supp. 71). The work on the apartment house covered the period from October 21, 1939 until January 2, 1940, and the plaintiff and his partner has five to six men working on this job (App. Supp. 173). Plaintiff testified that he lost money to his sorrow on this job (App. Supp. 71). That he never made enough to pay an income tax, and that he did not make \$200.00 a year on his painting and papering jobs. He lost money

on the Grisby job (App. Supp. 78). He made 10% of the cost on the Smith job.

This court does not sit as a jury passing upon the facts. It is only when the evidence is insufficient that this court has a right to reverse the verdict of the jury. All issues of fact are for the jury. *Galt v. Phoenix Indemnity Co.*, 120 Fed. (2) Adv. 723, decided by this court on May 26, 1941.

In order to recover upon a contract of war risk term insurance upon the ground of permanent and total disability, it is not necessary that the insured be helpless or bedridden. It is enough if an insured is suffering from such an impairment of mind or body as prevents him from continuously following any substantially gainful occupation. *Lumbra v. United States*, 290 U. S. 551, 559, 78 L. Ed. 492.

It is not necessary that the insured abandon every effort to work in order for a jury to find that he became permanently and totally disabled. His unwillingness to live a life of idleness, even though permanently and totally disabled should not prejudice his rights under the insurance contract.

The case of *Berry v. United States*, 61 Supreme Court Reporter Advance 637, arising in the District of Vermont was such a case. The plaintiff recovered a judgment on his war risk insurance contract in the District Court, and the government appealed. The United States Circuit Court of Appeals for the Second Circuit expressed great sympathy for the plaintiff, and then substituted its judgment on the facts for that of the jury and reversed the judgment. The

United States Supreme Court granted the petition for certiorari and on March 3, 1941 reversed the Second Circuit. In the vigorous opinion of Mr. Justice Black he emphasized that issues of fact were for the juries.

In the *Berry* case, the work record and the earning capacity of the plaintiff was far more than that of the appellee in this case. In the *Berry* case this appellant contended that vocational training from 1919 to 1923 as an automobile mechanic, the plaintiff being rehabilitated, and having pursued that occupation for a period of time, together with work as farmer, and a salesman during the year 1930 precluded his recovery. The plaintiff in the *Berry* case earned almost as much in one year, as this appellee earned from 1918 to the present time. Yet we here have the appellant claiming that the work record of this plaintiff as a matter of law bars recovery.

It is only fair to state, however, that the appeal in this case was taken before the *Berry* decision was rendered. It is very doubtful if this appeal would have been taken if the *Berry* decision had been handed down at that time.

The following language of the able opinion of Mr. Justice Black in the *Berry* case is applicable here:

“It is not necessary that petitioner be bedridden wholly helpless, or that he should abandon every possible effort to work in order for the jury to find that he was permanently and totally disabled. * * *.

There was evidence from which a jury could reach the conclusion that petitioner was totally and permanently disabled. That was enough. The judgment of the Circuit Court of Appeals is reversed and that of the District Court is affirmed.”

The day when a Circuit Court of Appeals may substitute its judgment for that of a jury on the facts has passed. The Supreme Court not only reversed the *Berry* case on this point, but on the same date they also reversed the judgment of the same Circuit in the case of *Conway v. O'Brien*, (61 Supreme Court Reporter Adv. 634) for the same reason that the court had substituted its judgment for that of the jury on an issue of fact.

There is no merit in the contention of the appellant here that as a matter of law an insured suffering from a severe heart disability, tuberculosis, and a nervous condition existing for a long period of time is not permanently and totally disabled.

No good reason exists for citing a long list of cases involving war risk insurance when the United States Supreme Court has spoken on the matter. The case of *Woltman v. United States*, 57 Fed. (2) 418 decided by this Court is directly in point. In that case, the plaintiff brought a suit on his war risk insurance contract alleging permanent and total disability. He alleged and proved that he was suffering from a case of arrested tuberculosis and a heart condition while his insurance was in force. The general disabilities of the plaintiff were such that he could not follow a gainful occupation, and the judgment in his favor was affirmed by this Court.

The case of *Madray v. United States*, 55 Fed. (2) 552, 4th CCA, is also in point. In that case, the District Court for the Eastern District of South Carolina directed a verdict for the government upon the ground that the evidence did not show that the plaintiff was permanently and totally disabled. Upon appeal the Circuit Court of Appeals for

the Fourth Circuit held that the evidence was sufficient to justify a submission to the jury. The plaintiff showed that he had been suffering from psychoneurosis for 13 years. In the case now before this court plaintiff has in addition to a diagnosis of psychoneurosis, a major heart disability, and a tubercular condition which as early as 1922 was diagnosed as being moderately advanced. The plaintiff testified that he had pains around his heart since 1918, and that his chest pained him from that date, that his feet had swelled since 1918, and that he had dizziness and had been nervous since that time. Appellant may not believe him but a jury of his peers had a right to believe his testimony and determine what was the true fact. If the testimony of the plaintiff is true, and for the purposes of this appeal it must be deemed to be true, it is a waste of time of this court to argue that the jury could not find as a fact that the plaintiff told the truth.

Where an insured has been unable to work because of a combination of diseases, the issue of fact as to permanent and total disability under a war risk insurance contract is for the jury. *United States v. Sauls*, 65 Fed. (2) 886, 4th CCA.

It is not even necessary that the disease be classified. *United States v. Tyrakowski*, 50 Fed. (2d) 766, 7th CCA.

Arrested tuberculosis alone is sufficient if the evidence shows that the plaintiff is unable to work. *United States v. Martin*, 67 Fed. (2d) 356, 7th CCA.

Recovery was permitted on a war risk insurance contract upon the ground of permanent and total disability upon a showing that the insured had a heart disability. *United States v. Brown*, 72 Fed. (2d) 608, 10th CCA.

It is interesting to note that in the *Brown* case, *supra*, there was evidence offered that the insured had worked for long periods as a railroad mechanic, covering the period from 1922 to 1924, and thereafter from July, 1925 until 1927 employment was shown by a motor company. Yet the Circuit Court of Appeals held that in spite of this evidence the other evidence was sufficient to sustain the verdict of the jury finding that the plaintiff became permanently and totally disabled in 1919.

One who has a serious and incurable ailment, for which rest is the recognized treatment and which will be aggravated by work of any kind, is nevertheless totally and permanently disabled, although he may for a time engage in gainful employment. One so incapacitated may only work at the risk of injury to his health and danger to his life. *Lumbra v. United States*, 290 U. S. 551, 560, 54 S. Ct. 272, 78 L. Ed. 492; *Nicolay v. United States*, (C. C. A. 10) 51 F. (2d) 170, 173; *United States v. Phillips*, (C. C. A. 8) 44 F. (2d) 689, 691; *Carter v. United States*, (C. C. A. 4) 49 F. (2d) 221, 223; *United States v. Lawson*, (C. C. A. 9) 50 F. (2d) 646, 651; *United States v. Burleyson*, (C. C. A. 9) 64 F. (2d) 868, 872; *United States v. Sorrow*, (C. C. A. 5) 67 F. (2d) 372; *United States v. Spaulding*, (C. C. A. 5) 68 F. (2d) 656.

In *United States v. Sorrow*, *supra*, the court said:

“One is totally disabled when he is not, without injury to his health, able to make his living by work.”

The evidence adduced by the plaintiff was sufficient to establish his permanent and total disability as of May 1, 1927 as found by the jury, and the District Court did not commit error in refusing to direct a verdict for the government.

Appellant, in support of his contention that there was no substantial evidence to show that appellee became totally and permanently disabled on May 1, 1927, cites three cases from other Circuit Courts of Appeal, *United States v. Barry*, 67 F. (2d) 763, 765 (C. C. A. 6th); *Eggen v. United States*, 58 F. (2d) 616, 620 (C. C. A. 8th); and *Deadrich v. United States*, 74 F. (2d) 619, 622 (C. C. A. 9th).

These cases are readily distinguishable from the instant case.

In the case of *United States v. Barry, supra*, the insured's contract of insurance was in force until October 1, 1919. He re-enlisted September 27, 1919 and continued in the Army until his death, which occurred March 31, 1920. In that case, the court stated:

"The determinative question is whether Barry's policy was in full force and effect at the time of his death because of the government's failure to deduct premiums from his monthly pay during his last enlistment."

The *Barry* case was a suit brought by the beneficiaries, and the question of total and permanent disability does not seem to have been in issue in that case. Clearly that is no case to be used as a precedent here.

The case of *Eggen v. United States*, 58 F. (2d) 616, was a case decided over nine years ago by the 8th Circuit Court of Appeals, where total and permanent disability was claimed from October 1, 1919, when the insured was discharged from the Army in good physical condition on August 24, 1919.

In the instant case, we have an insured who was discharged from the Army upon a surgeon's certificate of dis-

ability after being under observation by a Board of Army medical officers *because of valvular heart disease (mitral regurgitation)* (App. Supp. 4) *and decrease in cardiac compensation* subsequent to rheumatic fever; and here the question was not the insured's disability at date of discharge, but total and permanent disability at a time nine years thereafter. The *Eggen* case was one where the disability was incipient pulmonary tuberculosis. Here we have evidence of chronic pulmonary tuberculosis in 1919 (App. Supp. 8) and moderately advanced tuberculosis of both lungs in 1922 (App. Supp. 13), in addition to a severe disabling heart condition, a nervous condition, and other disabilities. In the *Eggen* case, the medical evidence did not establish the existence prior to the lapse of the policy of the disability from which he later suffered. In the instant case, however, the official records of the War Department show conclusively that this appellant was suffering from a serious heart disability when he was discharged from the Army.

In the case of *Deadrich v. United States*, 74 F. (2d) 619, mentioned by appellant, the issue before the court was whether or not the insured became totally and permanently disabled on June 1, 1919. In the instant case, the pertinent date is eight years later. Deadrich successfully passed a physical examination by a physician in the employment of the Standard Oil Company, and there was a long work record consisting of 8 months of selling and delivering spring water in bottles, 3 years taking care of cattle, driving a wagon for a lumber company for 2 weeks, 4 months on a ranch one time and 5 months on another, and over 2 years' work on the public highways, 4 months in a garage, and in addition he worked as a traffic officer for 15 months. Various former employers stated that he was not absent from work; that he never complained about his health; and his services were satisfactory.

Obviously, a recitation of the facts in that case when compared with those in the instant case shows no parallel between the two, and the decision of the court in the Deadrich case certainly shows no reason for this court to reverse the action taken by the court below in the instant case.

Point Two.

The second point raised by the appellant is that the court erred in excluding expert testimony offered by the appellant regarding the significance properly attributable to diagnosis of plaintiff's condition. This point may be disposed of summarily. While the brief states that the evidence was "offered" there is no offer of proof in the record. This court has nothing before it to determine what the answer of the expert, Dr. Foxwell, would have been to any questions which might have been propounded. In this state of the record there is no error. For all that the record shows any answer of the expert witness might have been favorable to the appellee.

Appellant should have made an offer of proof in order to obtain consideration of this point by this court. Unless this was done appellant cannot complain of any alleged error. The court cannot look beyond the record *Ricketts v. United States*, 32 Fed. (2d) 943, 59 App. D. C. 47; *Pilger v. Sutherland*, 57 Fed. (2) 604, 61 App. D. C. 84.

Specification of error in excluding testimony presents nothing for review where the bill of exceptions does not state what the witness would have testified. *Meador v. National Liberty Insurance Company of America*, 53 Fed. (2d) 731, 5th CCA.

Point Three.

The appellant complains because the court refused to grant two requested instructions. This point may also be disposed of summarily, because the record does not disclose compliance by appellant with Rule 51 of the Federal Rules of Civil Procedure. Appellant did not object to the granting or refusal to grant instructions and state distinctly the grounds of his objection as required by that rule.

No contention is made in the brief of the appellant that the jury was not properly instructed. The jury had before them the simple question of whether the appellee was permanently and totally disabled as of May 1, 1927 under proper instructions from the court, and to which no objection was interposed.

The complaint is made that the court should have gone further and granted two requested instructions relative to the ability of the plaintiff to carry on work of a gainful capacity of a supervisory or managerial nature. This question was fully and squarely before the jury as counsel for appellant devoted a large portion of his oral argument to the jury in pointing out what he considered to be the fact, that the appellee could engage in work of this character.

Counsel said (R. 424):

“Ladies and gentlemen, Mr. Cox says that he doesn’t have much education; though he was in vocational training for the objective of office assistant and office management for three years and four months in the Strayer business college. Do you think that they would have kept him that long if he had not made any progress? Absolutely not. Does Mr. Cox have the ability to carry on as a manager and as a supervisor of painting and paperhanging business? I say emphatically yes.”

Again (R. 426):

"Ladies and gentlemen of the jury is that a letter (calling attention to an exhibit) of a person who doesn't know anything? Is that a letter of a person who is incapable of managing a business? Now, ladies and gentlemen of the jury, under this contract, this is a contract to make money. It doesn't mean that a man must do manual labor himself. The Ford automobile salesman doesn't stand at the assembly line doing manual labor. Managers of real estate companies, construction companies, and other such people with positions as that don't do manual labor. They may do supervisory work. A fellow was an agent for the Atlantic Coast Line Railway and getting a good salary. Whenever any piece of equipment came in there that was broke, he would take his tools and fix it himself to save the railroad that expense when he should have been out getting business. He finally lost his job on trivials.

"Mr. Cox's time would be spent more advantageously going out and getting contracts. People don't come around and hand one contracts. You have to compete for them. Somebody has to do the work. There is no evidence here that Mr. Cox had a salesman who was securing contracts for him. He did that himself and he supervised the work * * * (R. 426). The man who wrote that letter, ladies and gentlemen of the jury is capable of supervising painting and paperhanging work. The evidence offered here by all the witnesses is that Mr. Cox did supervise the work, and these people held him responsible for the work, and they paid him the money for the work which he performed satisfactorily * * * (R. 427). Unfortunately, people who do the hardest work seem very often to make the least money. It is a question of whether a man was able to earn a livelihood in any substantially gainful occupation. I submit with all sincerity that Mr. Cox did continuously work."

At a number of other places in his argument counsel for the appellant called the jury's attention to the fact that the plaintiff was capable of performing work of a

supervisory nature. The issue was squarely before the jury for determination.

This court has recently passed upon the question raised by the appellant.

In the case of *Cohen v. Evening Star Newspaper Co.*, 72 App. D. C. 258, 115 Fed. (2) 525, this court said:

"A party has no vested interest in any particular form of instructions. This is true even though the proffered instructions may be unobjectionable in itself, standing alone, as a statement of law. What the language of the instructions shall be is for the trial judge to determine. If upon examination of the whole charge it appears that the jury has been fairly and adequately instructed the requirements of the law are satisfied * * * It is significant in this respect that appellant offered no objections to the court's charge as it was given to the jury; either upon the ground that whole charge was inadequate or that particular instructions were incorrect."

Counsel for the appellant read the following instruction to the jury covering permanent and total disability (R. 406):

"Any impairment of mind or body which renders it impossible for the disabled person to follow any substantially gainful occupation shall be deemed to be total disability.

Total disability shall be deemed to be permanent whenever it is founded upon conditions which shall render it reasonably certain that it will continue throughout the life of the person suffering from it."

The instruction given was sufficient to cover both manual labor and work of a supervisory character as was argued by the appellant's counsel. The jury understood the charge, and the counsel for the appellant understood the

charge as is shown by his lengthy argument on the ability of the plaintiff to follow work of a supervisory capacity. There was no reversible error in refusing the requested instructions even though they may have been proper ones. Counsel for the plaintiff do not deem it necessary to argue the propriety of the proposed instructions because the instructions granted fully covered the subject matter and counsel for the appellant did not except to them or complain to the court that the instructions granted were inadequate. Under the rule laid down by this court in *Cohen v. Evening Star Newspaper Co.*, *supra*, the refusal to grant the requested instructions did not constitute reversible error.

Point Four.

Under this point the appellant raises the question of partiality and bias on the part of the District Court and asserts that the government was deprived of a fair trial. This assignment of error is wholly without merit. There is no basis for the charge that the court below was prejudiced and biased in favor of the plaintiff. The trial of the case commenced before a jury on November 27, 1940 (R. 2). The record consists of 367 pages of testimony. The trial lasted until December 2, 1940. Three days were consumed in taking the testimony. Counsel for the appellee were particularly anxious that no possible error would occur, having in mind the possibility of an appeal from the verdict.

It is significant that the United States Attorney for the District of Columbia who is primarily charged with the defense of this action did not sign the brief in this court. As this court knows, this is a most unusual occurrence.

Is this because he does not agree with the arguments advanced in the appellant's brief? Or is it because he was not in sympathy with this appeal?

The extent to which a District Federal Judge may participate in a trial rests solely within his discretion. *Bissonette v. National Biscuit Company*, 100 Fed. (2) 1003, 2nd CCA; *Drumm-Flato Comm. Co. v. Edmisson*, 208 U. S. 534, 52 L. Ed. 606; *Manhattan Oil Co. v. Mosby*, 72 Fed. (2) 840, 8th CCA; *Goldstein v. United States*, 63 Fed. (2) 609 8th CCA.

In the recent case of *Bethlehem Steel Co. v. National Labor Relations Board*, 120 Fed. (2) Adv. 641, decided by this court on May 12, 1941, this court stated:

"We are told that he associated himself with the attorney for the Board in the prosecution of the Board's case * * * taking over the cross examination on behalf of the attorney for the Board where the latter found himself in difficulty. Petitioners make other comparable complaints. It is the function of the examiner, just as it is the recognized function of a trial judge to see that facts are clearly and fully developed. He is not required to sit idly by and permit a confused and meaningless record to be made."

Since the enactment of 28 U. S. C. A. 391, 40 Stat. 1181 no error is presumed to be prejudicial. This act provides as follows:

"28 U. S. C. A. 391 (Judicial Code, Section 269 as amended: New trial; harmless error). All United States Courts shall have the power to grant new trials, in cases where there has been a trial by jury for reasons for which new trials have usually been granted in courts of law. On the hearing of any appeal, certiorari, writ of error, or motion for a new trial in any case, civil or criminal the court shall give

judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties." (R. S. 726, March 3, 1911 C. 231. 36 Stat. 1163 C. 48, 40 Stat. 1181.)

The rule that technical errors and defects should be disregarded is greatly strengthened by Rule 61 of the Federal Rules of Civil Procedure recently adopted by the United States Supreme Court. This rule provides as follows:

"Rule 61. Harmless error. No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the Court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

It is clear that the substantial rights of the appellant here were not affected by any action of the Court below.

With the foregoing in mind let us examine the serious charge that appellant makes against the trial judge in this case.

Appellant first complains of the Court's questioning of Dr. Foxwell, expert of the appellant who had never even examined the plaintiff. The Court asked this witness only one question on direct examination (App. Supp. 176). After he had testified that a patient with a moderate degree of psychoneurosis is encouraged to work to divert his attention and it should have a beneficial effect upon his health, the record shows the following:

"By the Court: The difficulty is to get him to do it.

A. Sometimes, yes.

The Court: Of course, that is the difficulty."

On cross examination of this expert (App. Supp. 177-178) the following question was asked the expert:

"Q. Many of the medical authorities today do not agree where the dividing line is between neurasthenia and psychoneurosis, isn't that a fact?

A. I don't think so.

By the Court: You don't?

A. No, sir."

The statement of the court is shown on page 29 of the appellant's brief (App. Supp. 183-184) in no way conflicted with the testimony of the appellant's expert. The court was trying to point out to the jury that one physician might diagnose a condition in one way today, and in another way later. This is a simple statement of what is generally and well known to be an undisputed fact. The expert witness of the appellant did not touch upon the subject in this respect. The remarks of the Court were directed to an objection to the expression of opinion on physicians' diagnoses.

The brief of the appellant then complains because the court interrogated the plaintiff about his early education (App. Brief 30).

The principal complaint seems to be that the trial court warned counsel for the appellant that further questioning along a particular line would be contempt of court. The substance of this testimony and statements is shown on page 32 of the appellant's brief, and pages 131-132 of the Supplement.

Counsel for the appellant had asked the witness, Dr. Guynn whether his remuneration was dependent or contingent upon the outcome of the case.

The record shows (App. Supp. 130):

“Q. Doctor how much are you to get in this case?

The Court: That is not a proper question.

Mr. Dawson: I object to that, your Honor.

The Court: That is not a proper question.

Mr. Spell: I will reframe the question, your Honor.

Q. Are you on a retainer in this case?

The Court: That is not a proper question.

Mr. Spell: I should like to show his interest, your Honor, in the outcome of this lawsuit.

The Court: That is all right, you may not show it that way.

Mr. Spell: Yes.

Q. Doctor, would you get a larger or smaller fee if plaintiff should win this case?

The Court: The Court is not going to permit questions like that in this courtroom. The court will not permit that sort of examination.

Mr. Dawson: I will say right now he will not.

The Court: Why everybody knows the doctor is employed to testify as an expert, and he is going to be paid for it I suppose. He should be.

The Witness: *ALREADY PAID FOR IT.*

Mr. Dawson: Your Honor in view of the fact that Counsel has brought this issue up—

The Court: There is no occasion—unless there is something about the Doctor's testimony, the witness' testimony which justified it. It is never permissible to reflect, obviously reflect upon the character of the witness and there has been nothing up to this time in the witness' testimony which justified anything of the kind.

Mr. Spell: I would like to show your Honor whether he is conscionally or unconscionally interested in this matter.

The Court: The court will not permit that sort of examination. Sir, absolutely will not permit in this courtroom.

Mr. Spell: Yes.

The Court: It is contempt of court.

Mr. Dawson: I will make a statement if Mr. Spell—

The Court: It is not necessary.

Mr. Dawson: Very well.

The Court: You have as much right to pay a lawyer in every case on the stand and ask him how much fee he is going to get or whether his fee is contingent or actual and how much the contingency is, there is no difference in the world. If you start that kind of thing, why you couldn't run a court. In other words, he would have just as much right to put you on the stand and ask you what your salary was.

Mr. Spell: It would be all right with me.

The Court: It might be all right with you, but he wouldn't have a right to do it" (App. Supp. 132.)

The appellant makes much of the foregoing, but as shown above, counsel for the appellant repeatedly followed the same line of questioning after he had been informed by the court that the question was improper. There was only a mild admonition from the Court that further questioning along this line would constitute contempt of Court. The witness had answered the question by stating "Already paid for it" (App. Supp. 131) but counsel still insisted that he had a right to further question the witness along this line after the answer of the witness showed that he had no interest in the outcome of the case. The only thing that the court could do under the circumstances was to warn counsel for the government that further questioning would constitute contempt of court.

Whatever mild censure there was of counsel for the appellant was brought about by his own conduct. He refused to abide by the ruling of the court, and in defiance of such ruling repeatedly asked the same type of question. Counsel persisted even after the witness had stated he had al-

ready been paid for his services, and this answer which was already in the record was all that counsel could have expected to elicit from the witness.

The appellant cites the case of *Sprinkle v. Davis*, 111 Fed. (2) 925, 4th CCA, as authority requiring a reversal of this case. But that case is not in point. In that case, the court charged the defendant's counsel with constant breaches of the rule against admission of evidence, and declared that he would impose a fine upon him if the practice continued. There was also a record showing serious conflicts between the court and the defendant's counsel. No such a situation exists here. Justice would be flouted if all a lawyer had to do was to ask question after question which he knew the court would rule out and had ruled out, until the patience of the court was exhausted, and counsel had been warned of contempt, and upon losing the case asked the Appellate Court to reverse a judgment because of the court's action.

If appellant's contention is correct then no court could warn counsel that he might be in contempt of court without a reversal of any judgment against the party causing the court to take the action. Under this rule of law, any party or his counsel could at any stage of the trial, when convinced that their case was lost, ask question after question in defiance of the court's ruling, and if warned of contempt of court be rewarded for his misconduct by a new trial. If this court should follow the appellant's argument it would establish a dangerous precedent hampering the administration of justice as each lawyer could so conduct himself that he would never lose a lawsuit. Certainly this court will not take the responsibility of creating such a situation.

Fortunately for the plaintiff this is not the rule. The correct rule on the question appears to be laid down in the case of *Newman v. United States*, 28 Fed. (2) 681, 9th CCA, which holds that it is within the court's discretion to rebuke or censure counsel in the jury's presence for irregularity of practice or misconduct in the case, and the trial court's conduct in this respect, or in punishing the attorney, does not warrant reversal, unless clearly prejudicial to the rights of the party.

In the above case the record shows:

"Mr. Caldwell:

Q. When you were over at Vancouver and put up in this fine suite of rooms you told us about, what date was that?

A. That was on the 29th of March, I believe.

Q. The 29th of March. You rode up there in Newman's car?

A. I think we did, yes.

Q. You registered under what name?

Mr. Savage: Objected to as immaterial.

The Court: Sustained.

Mr. Caldwell: It shows that he was not acting openly.

Mr. Savage: We object to the statement of counsel.

The Court: Interrogate the witness.

Mr. Caldwell:

Q. Isn't it a fact you registered under the name of Kennard?

Mr. Savage: We object to that. I thought the court sustained the objection.

The Court: Yes. You put it that way for the purpose of evading the court's ruling. You are fined \$50.00 for your conduct which is disorderly and obstructive."

The judgment of conviction of the defendant was affirmed the Circuit Court holding that the rebuke of counsel and the \$50.00 fine did not constitute reversible or prejudicial error.

The Circuit Court said that the generally recognized rule is well formulated in the note to 42 L. R. A. (NS) 428 as follows:

“It is within the province of the court to rebuke and censure counsel in the presence of the jury for irregularity of practice or misconduct in a case. To warrant a reversal because of the conduct of the judge in rebuking or punishing an attorney during the trial it must appear that the conduct measured by the facts of the case presented, together with the result of the trial, was clearly prejudicial to the rights of the party.”

“Common observance does not lead us to think that the ordinary citizen whether on or off the jury idealizes the function of counsel in a criminal case as apotheosizes the judge. Were such his conception all adverse rulings would be as implying criticism or rebuke. Jurors realizing that his compelling desire being for the success of his client, counsel may in his zeal be unduly insistent, and by overstepping the line of propriety may incur rebuke. But such incidents we are inclined to think are taken as a matter of course and do not, except under extraordinary circumstances influence the jurors upon the question of defendant's guilt or innocence. A jury of moderate intelligence would know that the incident here was without material bearing on the issues he must decide. * * * We think that is clearly a case of the application of the Judicial Code (28 U. S. C. A. 391) declaring that appellate courts shall give judgment without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties.”

It seems that in view of the above language a juror of moderate intelligence would know that the incident was without material bearing on the issues he must decide.

How could the fact that counsel for the appellant had asked an expert about his fee in the case, and the witness

had replied "already paid for it" have any affect on the ultimate verdict of the jury, even though the Court had rebuked counsel for asking repeated questions which counsel knew to be improper under the Court's ruling? It had no effect at all for if this case were tried a hundred times before a jury on the same evidence offered in this case the plaintiff would get a verdict every time.

To reverse this case because of the misconduct of the appellant's counsel would be a gross injustice when the plaintiff is so justly entitled to a verdict upon the facts. It would provide a pattern for irresponsible defense counsel to follow so that they might never lose a case, no matter what the merits of the action might be.

The Trial Court showed every courtesy to counsel for the appellant. At the very opening of the trial, the Court excused a juror because he had a war risk insurance contract (R. 5). The Court stated "The Court thinks that in fairness to the government he should be excused." The Court permitted the plaintiff to be cross examined at length overruling objections to questions even to the amount of the property which the mother of the plaintiff owned (App. Supp. 45). The Court permitted government counsel to go over testimony time and again in order that the facts might be fully brought out (App. Supp. 59). The Court sustained the appellant's objection to the prognosis of plaintiff's disabilities (App. Supp. 12).

The Court permitted counsel for the appellant to extend his cross examination and said:

"You complete your examination and don't hurry on that account" (App. Supp. 90).

The Court permitted the widest cross examination of the plaintiff, even to the point of repetition (App. Supp. 41-75 and 81-83).

The Court overruled the objection to a question on cross examination by government counsel even though the question had been asked and answered before (App. Supp. 97).

The Court permitted government counsel to ask other questions although he had finished with the witness (App. Supp. 74).

The Court even permitted appellant's counsel to violate District Court Rule No. 37 in submitting requested instructions for the jury. Counsel for the appellant did not comply with the Court rule requiring each instruction to be placed on a separate sheet of paper. For this reason all of the requested instructions of the appellant could have been rejected by the Court, but the Court stated: "that if the objection was insisted upon he would have to grant time to government counsel to rewrite the requested instructions" (R. 369).

The Court gave the appellant's counsel one hour for oral argument when the plaintiff only requested twenty-five to thirty-five minutes (R. 367). When counsel for the appellant had exhausted the one hour limit, the Court extended the time for a short period so that appellant's counsel might properly conclude his argument (R. 369).

Counsel for the appellant frequently, and without any reasonable or just cause objected to the legitimate argument of counsel for the plaintiff before the jury but received no rebuke from the Court for this irregular practice. In

the face of all this fair and just treatment by the Trial Court, appellant now assigns this extraordinary and unusual charge of bias and prejudice as a reason for overturning the verdict of the jury. If anyone got the "breaks" of the case it was the appellant. To charge that this United States District Judge who tried this case is biased and prejudiced against his own government upon the basis of the record in this case is logically unsound.

Conclusion.

The appellee respectfully submits that the judgment of the District Court should be affirmed.

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